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STATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS 16 EDC 03825

COUNTY OF WAKE

by and through his mother Petitioner,	FINAL DECISION
v.	
Wake County Public School System Board of Education Respondent.	

INTRODUCTORY PARAGRAPH

THIS MATTER was heard before Administrative Law Judge Stacey B. Bawtinhimer on October 4-7, November 16-18, November 28-30, and December 1, 2016 at the Office of Administrative Hearings in Raleigh, North Carolina.

Petitioner filed a Petition for a Contested Case Hearing ("Petition") in the Office of Administrative Hearings on behalf of her son, on April 15, 2016, alleging, *inter alia*, that the Wake County Public School System (hereinafter "WCPSS, Wake County Schools, or Respondent") violated the procedural and substantive requirements of the Individuals with Disabilities Improvement Act ("IDEA"), its implementing regulations, and state law, thus denying her son a free and appropriate public education ("FAPE") in the least restrictive environment ("LRE").

After considering a hearing on the merits held on the above-mentioned dates, arguments from counsel for both parties, all documents in support of or in opposition to the parties' motions, and all documents in the record as well as all stipulations, admission, and exhibits, it appears to the Undersigned that Respondent violated the IDEA, its implementing regulations, and state law, thus denying a free and appropriate public education in the least restrictive environment, and the Petitioner is meaningful participation in the IEP process and judgment is for Petitioners on some, but not all, of the issues raised in this contested case.

APPEARANCES

For Petitioners:

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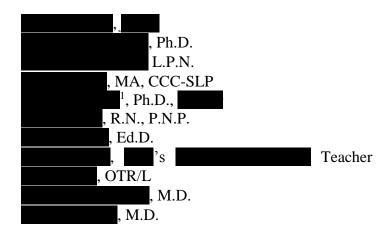
For Respondent:

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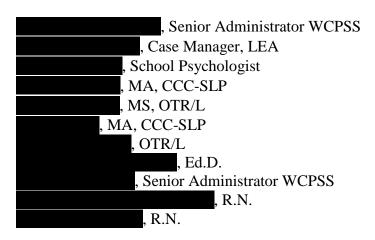
Fax: (919) 829-1583

WITNESSES

For Petitioners:



For Respondent:



¹ Petitioner is referred to in portions of the transcript as or Dr.

EXHIBITS

The following Stipulated Exhibits were received into evidence at the start of the hearing:

Stipulated Exhibits Nos. 1-55 (hereafter Stip. Ex. 1, Stip. Ex. 2, etc.)

The following exhibits were received into evidence during the course of the hearing:

Petitioners' Exhibits 1-5, 7 (pp.97-99), 16 (pp.496-497), 17, 29-38 (hereafter Pet. Ex. 3, Pet. Ex. 4, etc.).

Respondents' Exhibits 3, 4, 15, 18, 19, 21-23, 25, 35 (pp. 412-415), 37-39, 43-45 (hereafter Resp. Ex. 1, Resp. Ex. 2, etc.).

The exhibits have been retained as part of the official record of this contested case.

PROCEDURAL BACKGROUND

Petitioners filed a Petition for a Contested Case Hearing on April 15, 2016. The Petition raised claims related to the provision of a free, appropriate public education to the student, through his evaluation and eligibility determination and the 2015-16 school year up to the date of the Petition.

At the start of the hearing, Petitioners made an oral motion *in limine* to limit the evidence in the case to evidence existing at the time of the Petition. Subject to a qualification by Respondent's counsel that Respondent intended to present some evidence of discussions of academic progress that occurred after the Petition was filed, which the Undersigned approved, the motion *in limine* was granted. However, it was also noted that to the extent that the Respondent had information prior to the due process filing and the Resolution Meeting which may have impacted their decision regarding the provision of School Nurse Services and avoided this contested case hearing, the Undersigned finds very relevant to the proceedings.

At the close of Petitioners' case, Respondent made an oral Partial Motion to Dismiss pursuant to N.C.G.S. § 1A-1, Rule 41(b). The Undersigned also raised *sua sponte* a jurisdictional issue regarding claims about the transportation personnel. After hearing arguments of the parties and reviewing the evidence presented by Petitioners, the Undersigned entered an Order dated December 2, 2016 dismissing the following portions of Petitioners' claims:

- 1. Claims regarding the training of transportation personnel and implementation of transportation as a related service;
- 2. Claims regarding the appropriateness of the gross motor IEP goals; and,
- 3. All claims regarding the implementation of the related services of speech and physical therapy.

REMAINING ISSUES

Competing sets of Issues for Hearing were proposed by the parties on the first day of hearing. Based on the presentations of the parties during the hearing, and subject to the December 2, 2016 Order dismissing certain claims, the Undersigned defines the remaining issues in, order of priority, to be determined as follows:

- I. Whether Petitioners met their burden of demonstrating that Respondent failed to offer a FAPE by determining that he did not require School Nurse Services ("School Nurse Services Issue") as a related service in the IEP meetings held on April 29, 2015, July 17, 2015, and February 2, 2016;
- II. Whether Petitioners met their burden of demonstrating that Respondent denied a FAPE by placing him in a Developmental Delay program in a separate preschool setting ("Placement Issue") for the 2015-16 school year; and,
- III. Whether Petitioners met their burden of demonstrating that Respondent denied a FAPE between April 16, 2015 and April 15, 2016 by offering substantively and procedurally inappropriate Individualized Education Plans with respect to: the IEP goals, excluding gross motor goals, ("Goals Issue"); the provision of direct instead of support occupational therapy as a related service ("OT Issue"); the failure to conduct an assistive technology/augmentative communication evaluation and a functional behavior assessment ("FBA") (collectively the "Evaluation Issue"); the sufficiency of the progress monitoring ("Progress Monitoring Issue"); and the denial of Extended School Year services ("ESY Issue").

BURDEN OF PROOF

Petitioners acknowledged in the Order on the Final Pre-Trial Conference entered on October 4, 2016 that they have the burden of proof in this contested case. The standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a). Black's Law Dictionary defines preponderance as denoting "a superiority of weight or outweighing." The finder of fact cannot properly act upon the weight of evidence in favor of the one having the onus, unless it overbears, in some degree, the weight upon the other side. North Carolina statutory law states that actions of local boards of education are presumed to be correct and "the burden of proof shall be on the complaining party to show the contrary." N.C. Gen. Stat. § 115C-44(b). The Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide with a free appropriate public education.

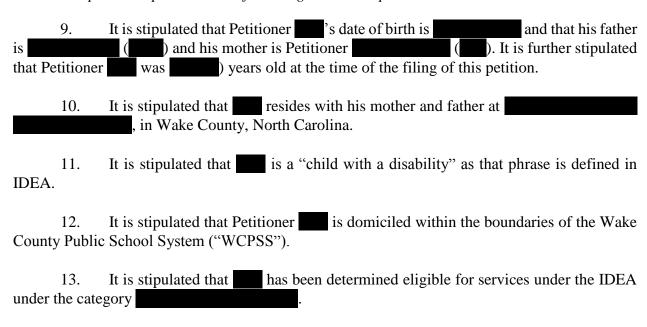
STIPULATIONS

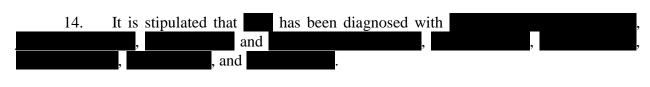
The parties proposed an Order on the Final Pre-Trial Conference, which was approved and filed in the Office of Administrative Hearings on October 4, 2016. The Order was amended by stipulation of the parties on February 13, 2017.

The parties stipulated to the following Jurisdictional, Party, and Legal Stipulations:

- 1. It is stipulated that the Petitioners and Respondent named in this action are properly before this Tribunal, and that this Tribunal has personal jurisdiction over them.
- 2. It is stipulated that the Petitioners and Respondent named in this action are correctly designated.
- 3. It is stipulated that as the party seeking relief, the burden of proof for this action lies with Petitioners. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
- 4. It is stipulated that the Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and implementing regulations, 34 C.F.R. Parts 300 and 301. The IDEA and implementing regulations and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed.
- 5. It is stipulated that the IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301.
- 6. It is stipulated that Respondent is a local education agency receiving monies pursuant to the IDEA.
- 7. It is stipulated that the controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations.
- 8. It is stipulated that the Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition unless the other party agrees otherwise. 20 U.S.C. § 1415(f)(3)(B).

The parties stipulated to the following Factual Stipulations:

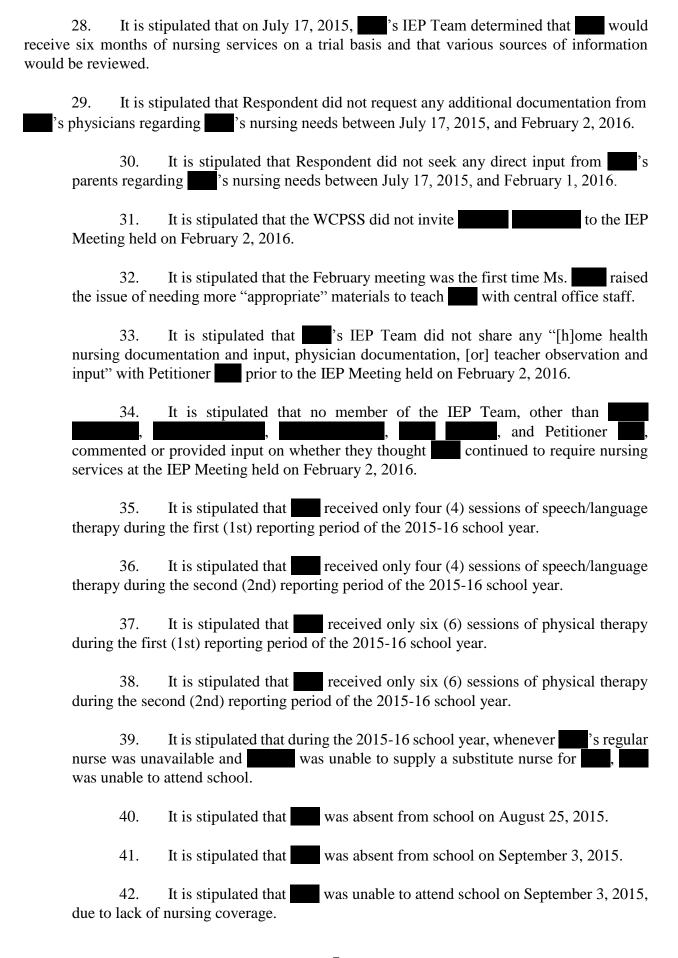


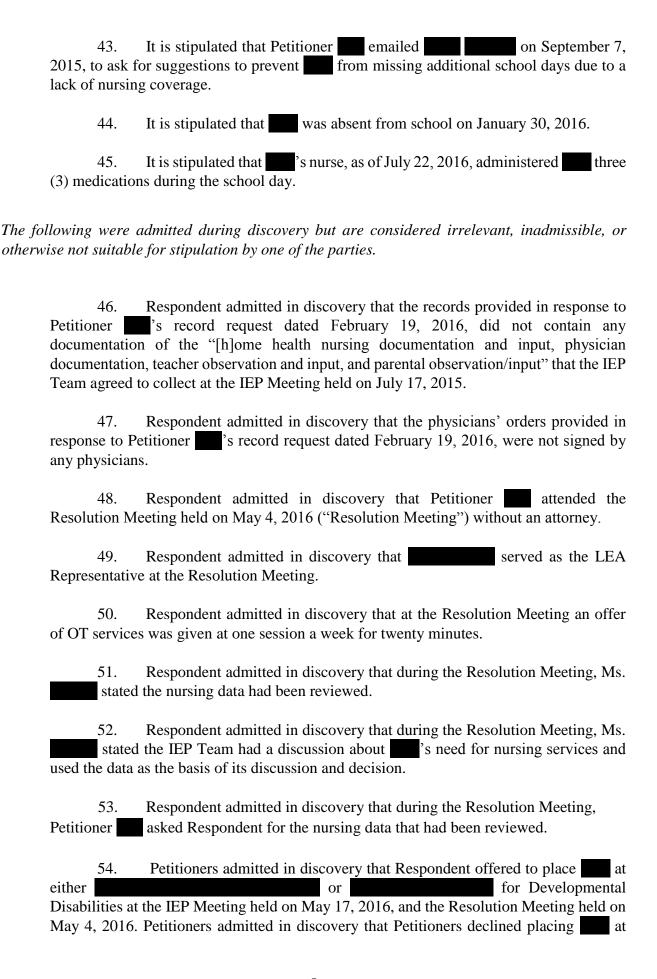


- 15. It is stipulated that the Wake County Public School System (WCPSS) convened an Initial IEP Referral meeting on March 3, 2015.
- 16. It is stipulated that the WCPSS administered a Preschool Multidisciplinary Assessment to on April 8, 2015.
- 17. It is stipulated that the WCPSS deemed eligible to receive special education services in the category of on April 29, 2015.
- 18. It is stipulated that the IEP Team developed still solve Initial IEP on April 29, 2015, effective from June 12, 2015, through April 28, 2016.
 - 19. It is stipulated that an Addendum IEP Meeting was held on July 17, 2015.
- 20. It is stipulated that attended preschool at Elementary School for the 2015-16 school year.
- 21. It is stipulated that served as served as 's teacher during the 2015-16 school year.
 - 22. It is stipulated that an Addendum IEP Meeting was held on February 2, 2016.
- 23. It is stipulated that a Reevaluation/Amendment IEP Meeting was held on March 3, 2016.
- 24. It is stipulated that the Petition for Contested Case Hearing at 16 EDC 03825 was filed in the Office of Administrative Hearings on April 15, 2016.

In addition to the factual stipulations above, certain admissions were requested during discovery. Those that were admitted are listed below. Where the parties agreed that the content of the admission was relevant to the hearing issues and admissible into evidence, the admissions have been converted to stipulations. Where the parties did not agree, the content of the admissions has been included solely as a record of those admissions rather than as stipulations.

- 25. It is stipulated that prior to the April 29, 2015, IEP meeting, expressed her preference for
- 26. It is stipulated that discussion of placement in the Regular Early Childhood Program setting was not reflected in the April 29, 2015 meeting minutes.
- 27. It is stipulated that was not raised or discussed at the April 29, 2015 meeting.





either or due to the locations of the schools and Respondent's unwillingness to provide transportation to and from the before and after school programs.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the stipulations of record, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed the evidence presented and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

Summary of the Case

- 1. is a medically fragile, the student who has a great smile and always seems happy. Tr. 911:16. His personality" and "easygoing." Tr. 911:15, 17. is well known throughout Elementary School. His personality is his greatest strength; he is a "rock star in our school." Tr. 911:18-21 (testimony). His smile just attracts people. Tr. 911:24.
 - 2. 's sunny disposition belies his serious medical issues.
- 3. When the petition was filed was years old. Stip. #9. He was and currently is diagnosed with , , , and , , and , , stip. ## 9, 14.
- 4. is a rare genetic disorder which comes with a host of medication conditions and affects 1 in 125,000 births. Tr. 984:24-25, 985:3 (testimony). Perhaps "once in a career" a pediatrician would treat a child with this rare genetic disorder. Tr. 984:25-985:2.
- 5. In addition, it is uncontested that has a "complicated medical history" and has the comorbid disorders of multiple origin and allergies to and allergies to so multiple is on multiple medications, and followed by various specialists including ophthalmology, pulmonology, neurology, nutrition, Ear Nose and Throat Specialist, urology, orthopedics, genetics, dermatology, infectious disease, and immunology. Stip. Ex. 27, p. 126.

explained that wears, and wears a re a fancy set of terms for a "Tr. 373:15-19. Wears a medic alert bracelet because of his Tr. 374:14-18; Tr. 997:5-15.

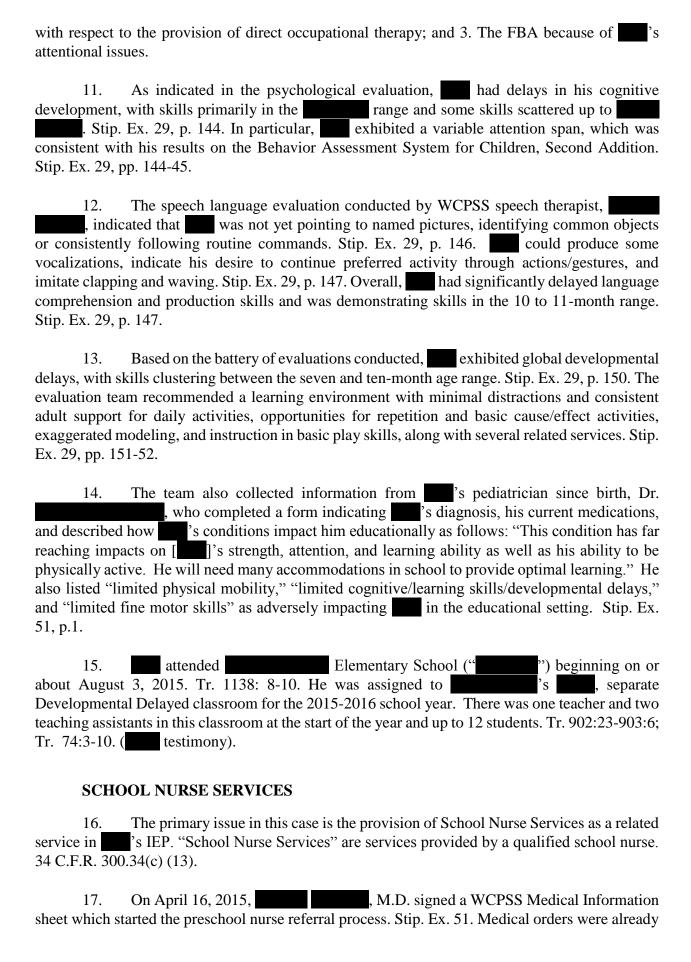
- 6. Part C of the IDEA, including in-home physical therapy one to two sessions per week, occupational therapy ('OT") one session per week for sixty minutes duration each session, speech language therapy one session per week, and community based rehabilitative services one session per week. also received feeding therapy through a speech language pathologist once every two weeks. Stip. Ex. 5, p. 12.
- 7. Prior to enrolling in Wake County School's preschool, the Early Intervention Services provided thirty-five (35) hours of a private duty nurse, in addition to respite care, to attend to his significant medical needs. Stip. Ex. 5, p. 13. When he transitioned to Wake County Schools, these nurse services were removed. Wake County Schools did not recommend or conduct a medical evaluation prior to removing nurse services.

's Evaluations

- 8. On March 3, 2015, the Preschool Assessment IEP Team met to determine whether to evaluate Stip. Ex. 2, p. 3. The team decided to conduct the following evaluations: vision, hearing, academic achievement, mental ability, behavioral/emotional skills, perceptual development, processing development, developmental history, speech/language, visual motor integration, eye/hand coordination, fine and gross motor, and adaptive behavior³. Stip. Ex. 4, p. 9. signed a Consent for Evaluations on March 3, 2015. Stip. Ex. 4, p. 9. An occupational evaluation was not conducted by WCPSS rather the IEP Team adopted the OT evaluation completed by Ms. in January 27, 2015. Stip. Ex. 27, Stip. Ex. 29, p. 148. The OT issue is addressed on pages 54-57 in this Decision. The IEP team also did not discuss a medical evaluation for his nurse related services. Stip. Exs. 1-5. The failure to conduct a medical assessment is discussed *infra*.
- 9. Petitioners contend that Respondent failed to conduct complete evaluations of to fully determine his communication, behavioral, and educational needs. Stip. Exs. 1-10. Despite evidence was non-verbal, WCPSS failed to conduct an Assistive Technology Assessment ("AT") or an Augmentative Communication Assessment. Stip. Exs. 1-10. The IEP documents from 's Initial Referral IEP meeting on March 3, 2015, did not include any discussion of conducting an Assistive Technology Assessment or an Augmentative Communication Assessment. Stip. Exs. 1-5. Despite reporting 's attention was a concern, WCPSS failed to conduct an FBA of Stip. Exs. 1-10.
- 10. The evaluations at issue in this case are: 1. the speech-language valuation to the extent that an assistive technology evaluation was not conducted; 2. the occupational evaluation

³ The Petitioners did not contest the appropriateness of the functional visual and learning medium assessment and mobility/gross motor assessment conducted by and respectively. Stip. Ex. 30, p. 153; 29, pp. 149-50.

is nonverbal and Petitioners complain that the Respondent failed to conduct an assistive technology evaluation or an augmentative communication evaluation. For purposes of this decision, because the assistive technology evaluation would have evaluated 's needs for augmentative communication devises, reference to an assistive technology evaluation includes the augmentative communication component.



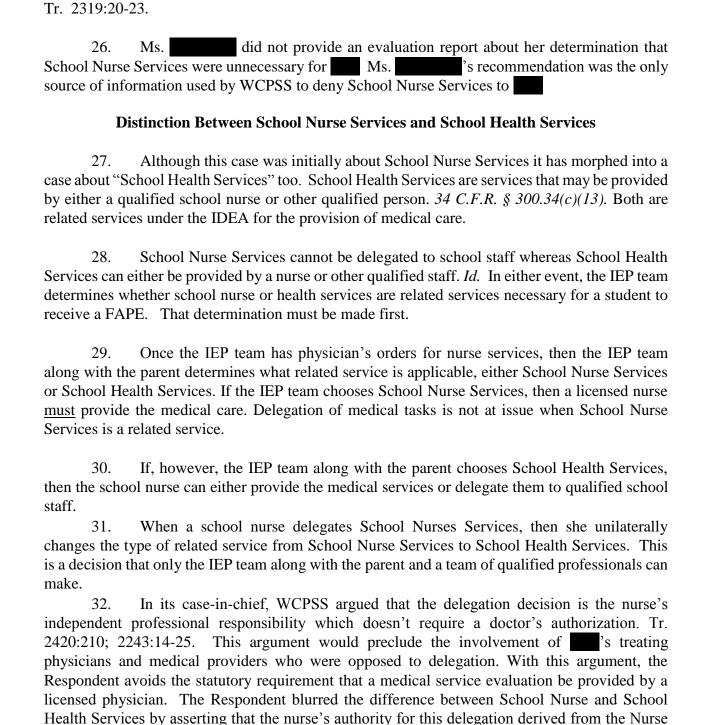
in place for Early Intervention nurse services. A signed physician's order is mandatory for the provision of nurse services. Tr. 2244:1-16 (testimony).

Medical Services for Evaluating a Student's Medical Care Needs

- 18. A "medical service" is available as a related service for diagnostic or evaluation purposes. NC Policy 1500-2.28(a) 34 C.F.R. 300.34(c)(5). These are "services provided by a <u>licensed physician</u> to determine a child's medically related disabilities that results in the child's needs for special education and related services. 20 U.S.C. 1401(26); 34 C.F.R. 300.34(c)(5) (emphasis added). WCPSS did not use a licensed physician to determine services. Instead, WCPSS relied exclusively on the determination of a Wake County Human Services nurse that nurse services were unnecessary. Ms. did not provide an evaluation report documenting her assessment of services or communications with his medical providers, parents or WCPSS staff.
- 19. Determination of seducational needs were not made by a team of qualified professionals and the parent. 20 U.S.C. 1414(b)(4)(A). A copy of the nurse evaluation report was not given to the parent as required by 20 U.S.C. 1414(b)(4)(B). WCPSS relied on the information from one person to determine eligibility and educational need and did not draw upon information from a variety of sources including parent input, information about the child's physical condition and ensure that information obtained from all these sources was documented and carefully considered. 20 U.S.C. 1414(b)(4)&(5); 34 C.F.R. 300.302(c)(i)&(ii).

Nurse Services and Medical Assessments in Wake County Schools

- 20. In the Wake County Public Schools, when a one-to-one nurse are necessary for a child to attend school, the school system contracts with an outside private nursing agency to bring a nurse into the school for that child. Tr. 2401:17-20.
- 21. Wake County Schools has over 110 students with g-tubes, and some of them do not require nurse services. Tr. 2421:12-17. There are five students with supplemental oxygen needs who use a pulse oximeter, and some of them require nurse services. Tr. 2422:18-2423:11.
- 22. At the time of the hearing, forty (40) students in Wake County Schools had one-to-one nurses. Tr. 2401:17-22.
- 23. According to the Respondent, when nurse services and delegation of nurse services are issues for a student with an IEP, the final decision regarding School Nursing Services and/or School Health Services is supposed to be made by the IEP team, with input and recommendations from the medically fragile nurse. Tr. 2255:23-2256:7; Tr. 2430:13-15.
- 24. Wake County Schools contracts with Wake County Human Services ("WCHS") for nurse assessments. Tr. 2459:9-22.
- , R.N. is employed by WCHS and provides preschool nurse assessments for Wake County Schools. Tr. 2393:16-19. Although she frequently attends IEP meetings and conducts assessments relied upon by the IEP Teams in these meetings, Ms.



testified that the WCPSS has not provided her with any training in IEP development.

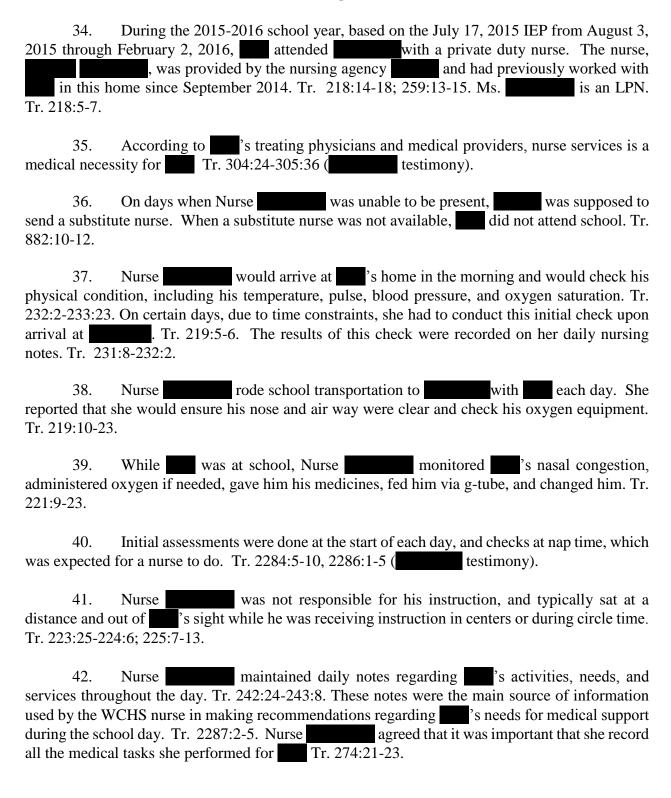
33. With its delegation argument, the Respondent has "opened the door" for School Health Services as a related service in this case even though School Health Services was not pled in the Petition and is not mentioned in any of the IEP documents. If School Health Services are deemed inappropriate by the IEP team, then by default, the delegation of nursing services can be at issue in the provision of School Health Services. The Undersigned contends that the IEP team never identified School Health Services as a related service in any of services.

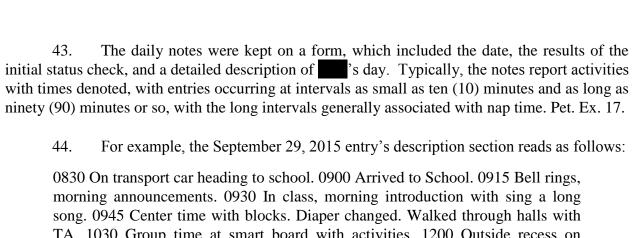
Practice Act. A school nurse has no authority under the IDEA to unilaterally change a related

service in a child's IEP.

be given that opportunity now for the first time in this contested case as a defense of the Respondent's actions. To the extent it must be addressed, relevant facts are reviewed on pages 3436.

School Nurse Services During the 2015-2016 School Year



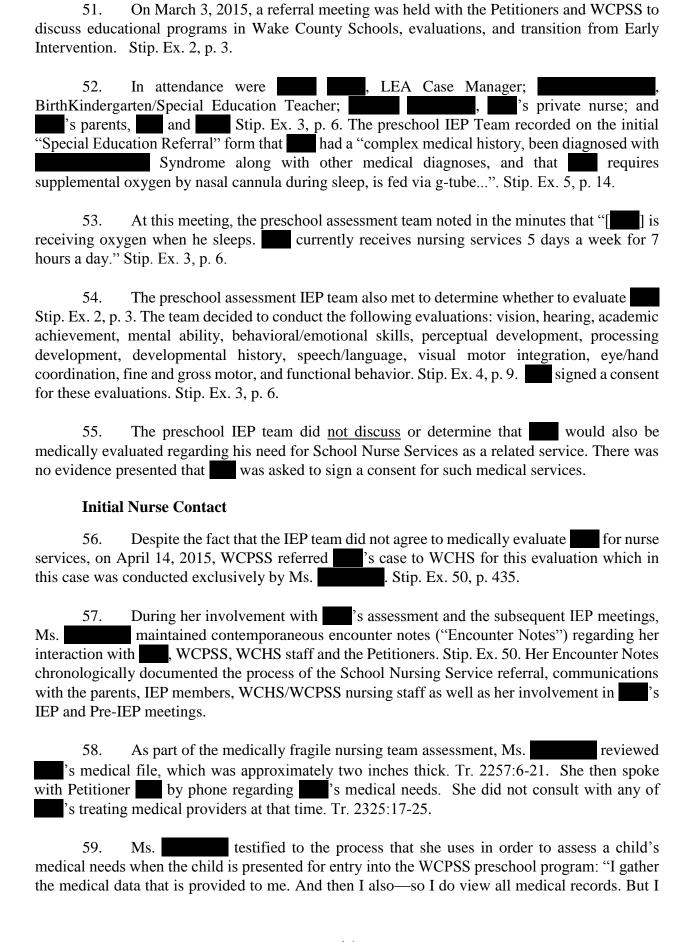


0830 On transport car heading to school. 0900 Arrived to School. 0915 Bell rings, morning announcements. 0930 In class, morning introduction with sing a long song. 0945 Center time with blocks. Diaper changed. Walked through halls with TA. 1030 Group time at smart board with activities. 1200 Outside recess on playground. 1030 lunch time, wash hands, PO feed ate 2 oz, administered 105 ml of formula via pump x 30 minutes, heated well. 1300. Diaper changed, client on cot for nap/rest, O2 portable tank on and connected via NC at ½ L O2 sat. monitor on and attached to probe on great toe. All alarms on. 1345. Administered meds pgt + 15 ml flush. 1430 client up and awake, alert. Diaper changed. 1500. PO feed atee 3oz + administered meds 15 ml. 1530 Dismissal from School. On cab headed to clients home. 1600. Arrived to client's home. Pet. Ex. 17, p. 570.

- 45. The daily notes generally contain the status check information from the initial check at the start of the day and from a status check during so nap. Tr. 271:12-20. Nurse testified that she was "assessing him all throughout the day" and would do "spot checks" often, although these assessments were not necessarily documented in her notes. Tr. 243:13; 251:9-10.
- 46. Nurse administered three (3) medications during the school day through his g-tube. Stip. #45. These medications changed frequently, at least monthly. Tr. 227:823 (estimony).
- 47. Based on the records and witness testimony, school hours included g-tube feedings, medication administration and assessments, pulse oximetry checks, supplemental oxygen and ongoing physical assessments. Tr. 1002:21-1003:5; 1068:161069:7; Stip. Ex. 43; Stip. Ex. 44; Tr. 243:13, 251:9-10.
- 48. Except for the physical and medication assessments, which are not delegable, according to the WCHS nurses each of these other tasks were delegable based on the nature of the procedures and 's specific medical needs. Tr. 2317:6-15; 2432:24-2433:3; 2445:9-12.
- 49. The main concern from 's medical providers was not the g-tube and oxygen administration but was the issue of ongoing assessment of Tr. 425:21-23; 435:11-13; 1060:38. 's treating medical providers expressed that they would not be comfortable with a trained layperson providing 's care in school. Tr. 74:15-18; 426:1-7; 1155:19-25. Petitioners and shared this concern as does the Undersigned as explained *infra*. Tr. 1185:10-12.

INITIAL PRESCHOOL REFERRAL PROCESS AND NURSE REFERRAL

50. Since was transitioning from the Early Intervention Services (Part C of the IDEA) to preschool services, WCPSS began the initial referral process for determining whether was eligible for special education services under Part B of the IDEA on March 3, 2015. Stip. # 15.



also—the parents are probably the most essential part because we are performing the daily cares that would occur in school that—they mimic the home care." Tr. 2249:12-16. 60. testified that she then prepares care plans and draft orders: "I do look at the medical records. I do either a telephone call with the parent or I do a home visit. And I do draft care plans based on the information I receive." Tr. 2251:3-7. testified that she drafts care plans and physician's orders before the IEP eligibility meetings, and that the plans and orders are subject to change depending on what the IEP team decides. Tr. p. 2252:5-8. The physician's order form includes a statement that the nursing duties would be delegated and the only variance in these orders are in the specific medical procedures and medications. Stip. Exs. 43-46. April 23, 2015 Home Visit On April, 23 2015 Ms. met with at her home for a "home visit" 62. which had been scheduled on April 14th. Stip. Ex. 50, p. 435. Ms. RN (another medically fragile nurse), discussed 's needs with Petitioner and the private nurse, specifically seeds and diagnoses, his oxygen saturations, bulb suctioning, allergies, digestive issues, hives, gravity bolus feedings, g-tube and mini button dislodgement procedure. Stip. Ex. 50, p. 435. During the home visit, Ms. explained that school staff would be doing the medical procedures and how the staff would be trained. Stip. Ex. 50, p. 435. Ms. predetermined that would not receive School Health Services as a related service. Her explanation included the "process of obtaining physicians orders for g-tube, suction, oxygen and then the process of training school and transportation staff." Stip. Ex. 50, p. 435. consents so that Ms. could contact 's physicians which she did not do at that time.⁵ 64. Ms. also testified that she described delegation to at the home visit, which is her practice. Tr. 2250:13-16 Her Encounter Notes, document that Ms. communicated to 's g-tube dislodged the "introducer [to reinsert g-tube] would not be used at school, staff will be instructed to insert button with lubricant but without introducer; also explained that school staff not allowed to inflate balloon." Stip. Ex. 50, p. 435. Ms. also explained the "process of obtaining physician orders for g-tube, suction, oxygen and then the process of training school and transportation staff." Id. If there was a medical emergency, school staff would call the parent or 911. See Stip. Exs. 43, 44, 45, & 46.

and before her involvement in this litigation, the Undersigned gives more weight to this

To the extent that Ms. 's Encounter Notes were taken contemporaneously

's testimony. Furthermore, Ms. 's testimony was

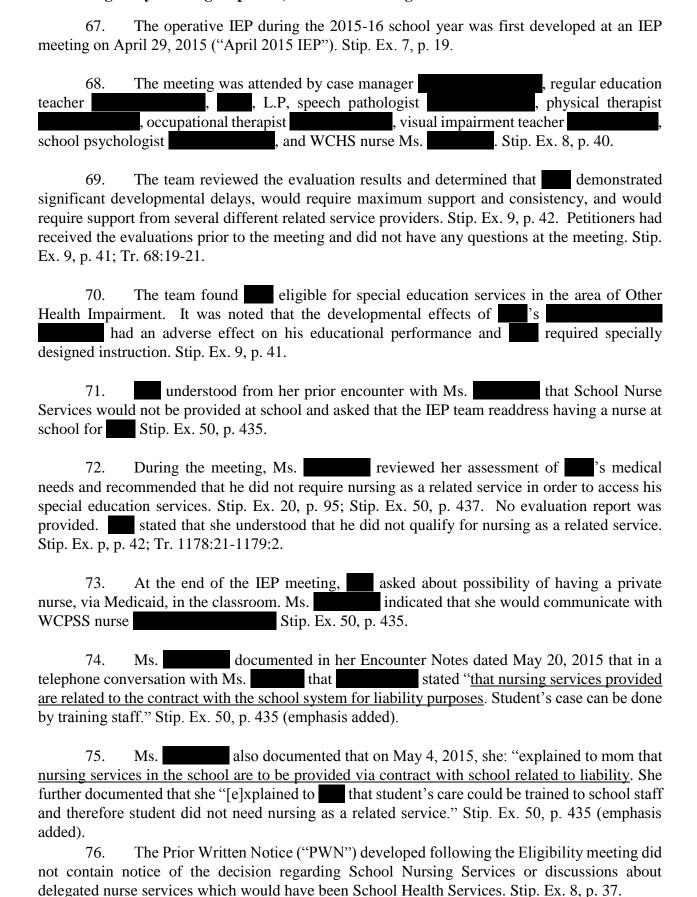
66.

documentation than Ms.

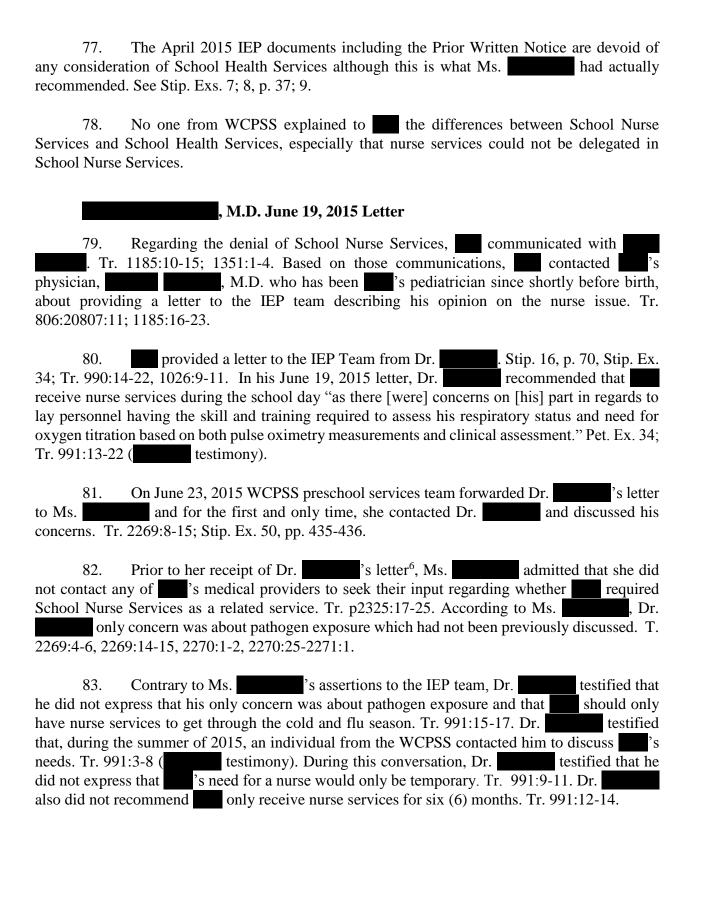
impeached by several witnesses including a WCPPS witness.

⁵ Interesting to note that the WCHS physician did not sign off on any of these Orders. *See* Stip. Exs. 43 (Cole), 44 (), 45 (), 46 ().

Eligibility Meeting: April 29, 2015 IEP Meeting

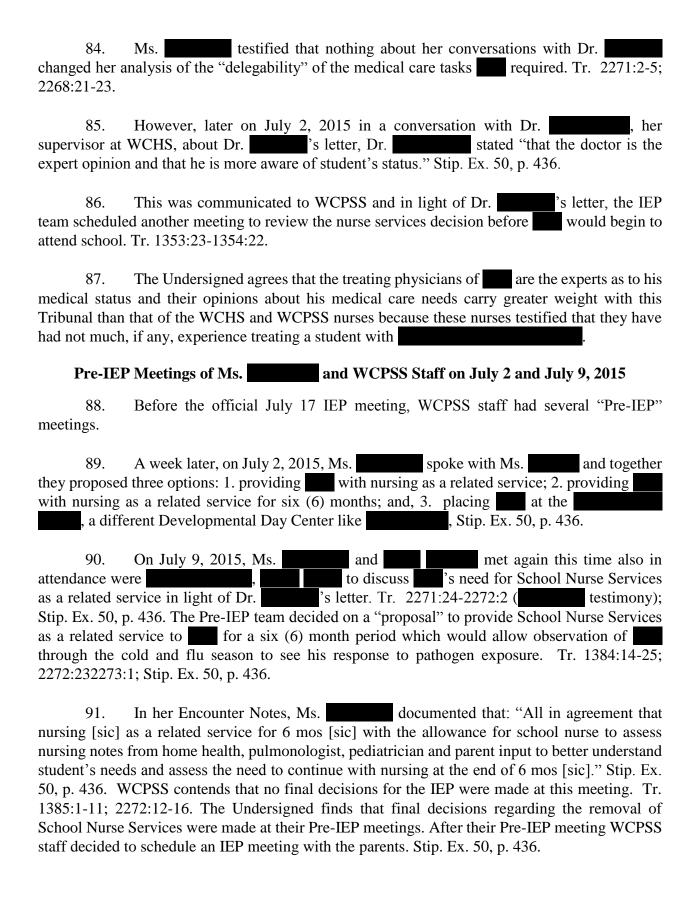


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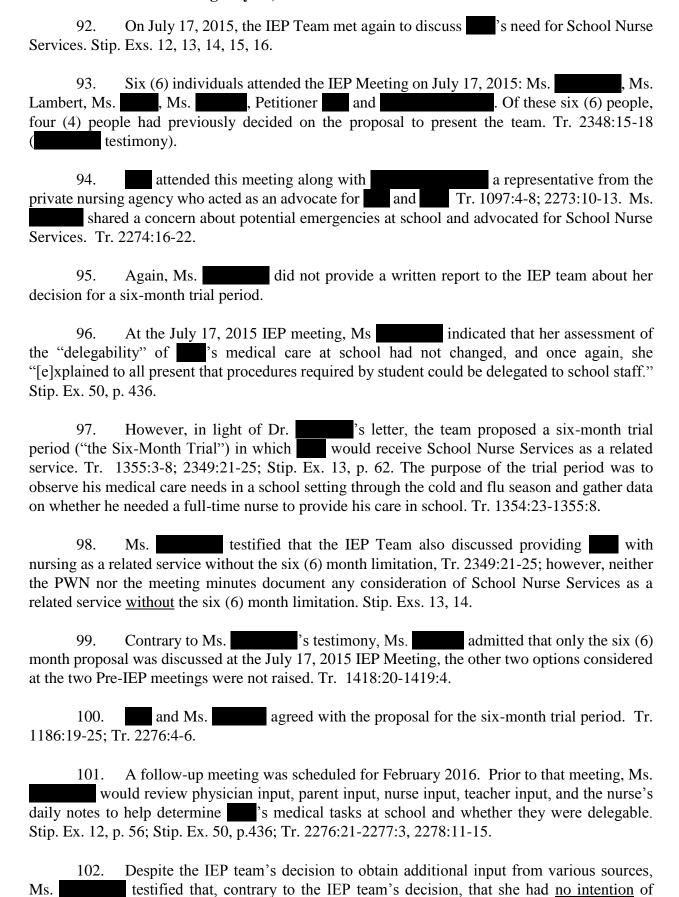


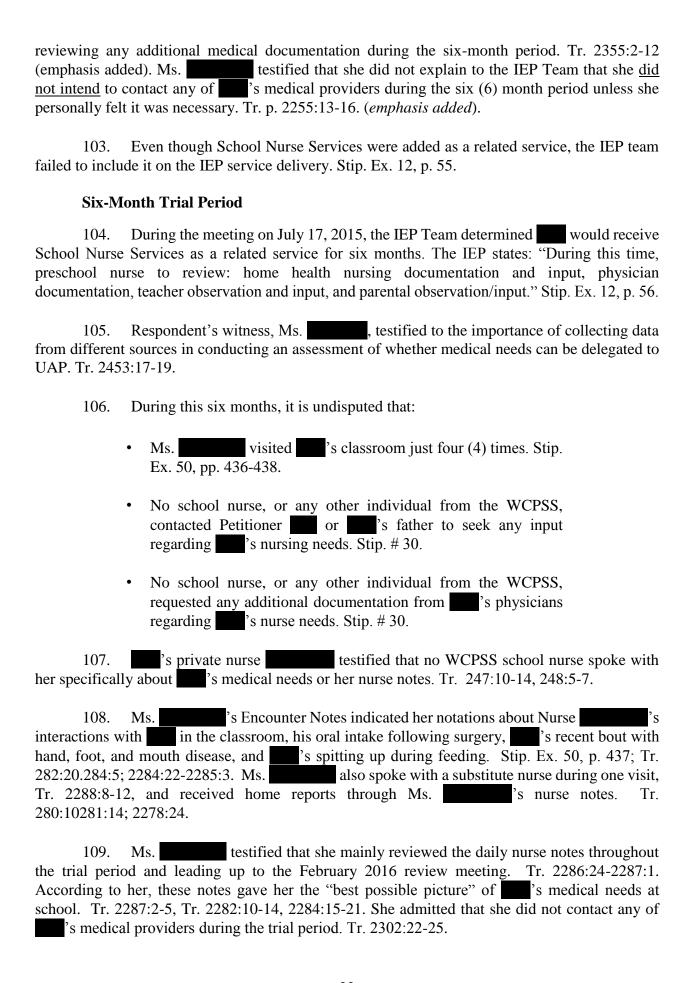
⁶ Dr. refused to sign the Physicians Orders for delegation and wrote a second letter dated March 15, 2016 urging WCPSS to provide School Nurse Services to Pet. Ex. 2. The contents of his second letter and Dr. expert witness testimony about some services are on pages 27-31 of this Decision.

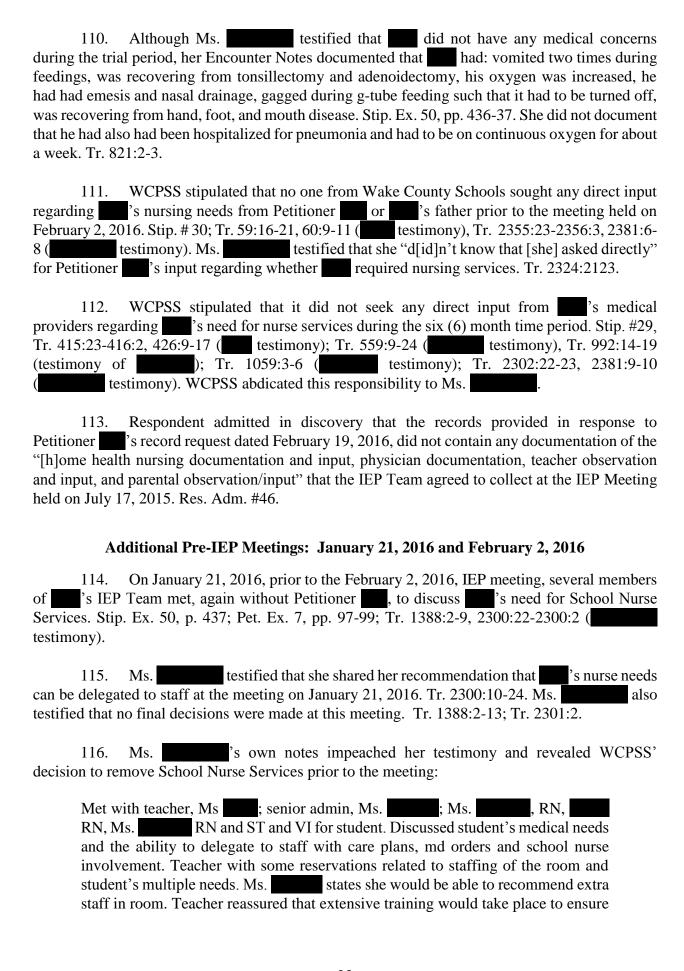
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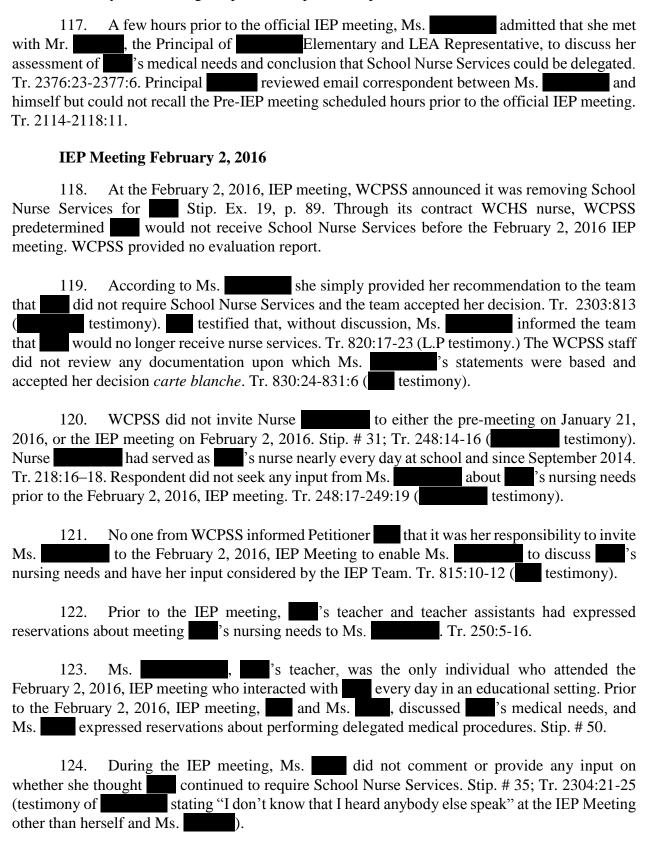
Official IEP Meeting July 17, 2015

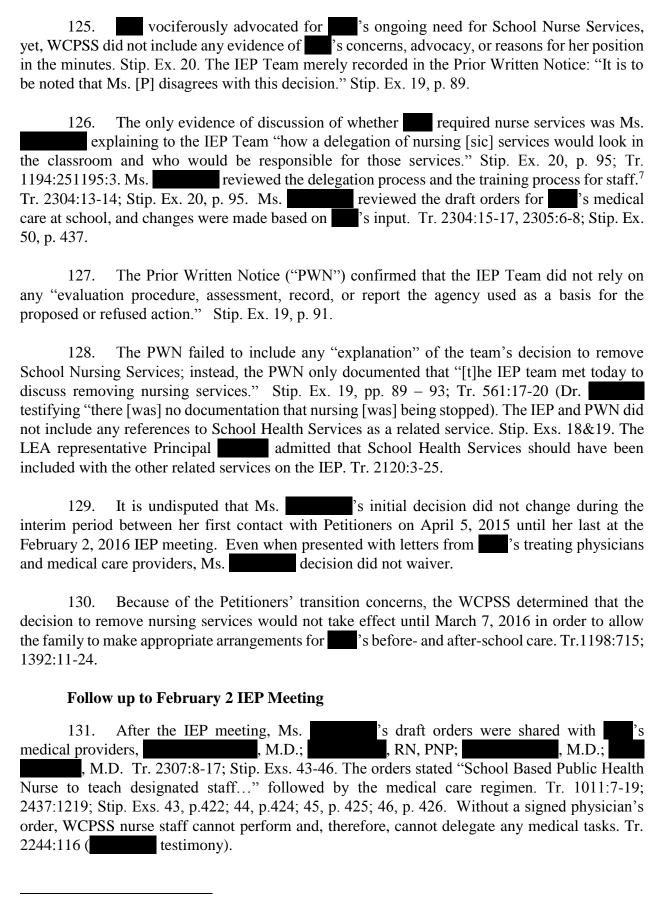






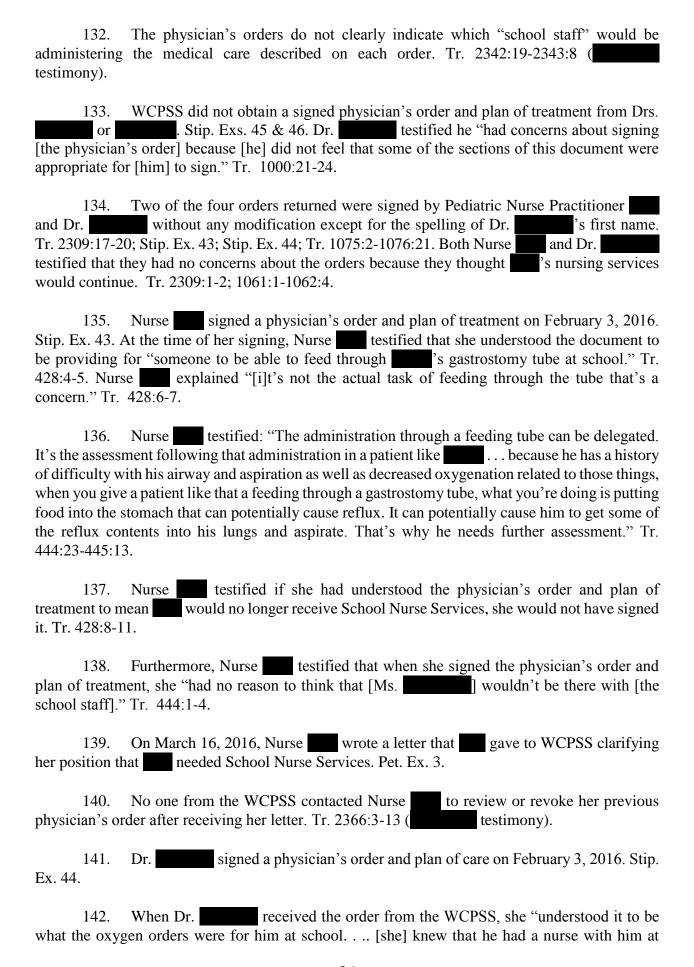
competency of tasks that will need to be provided to student. Scheduled IEP for February 2, invite to go to parents. Stip. Ex. 50, p. 437.

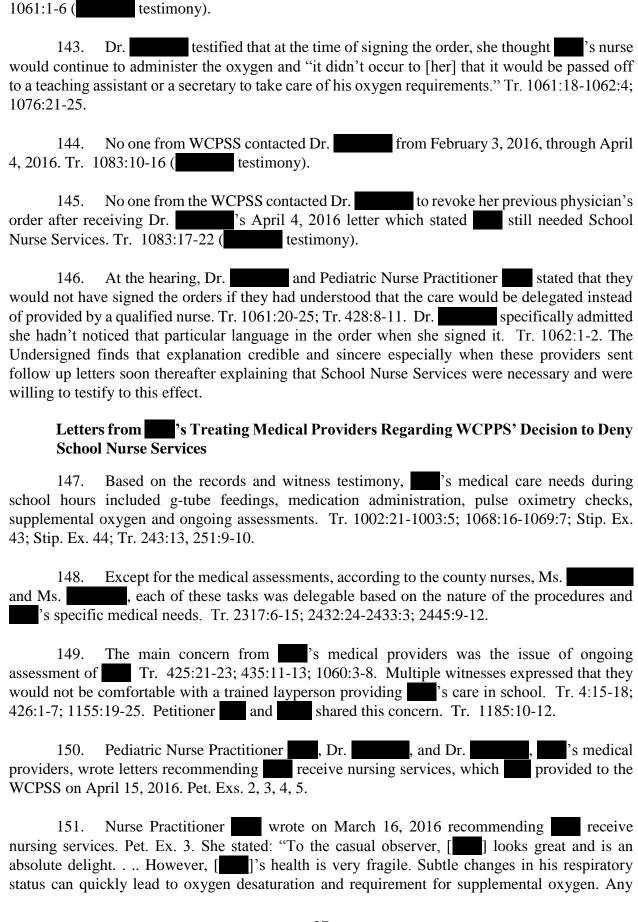




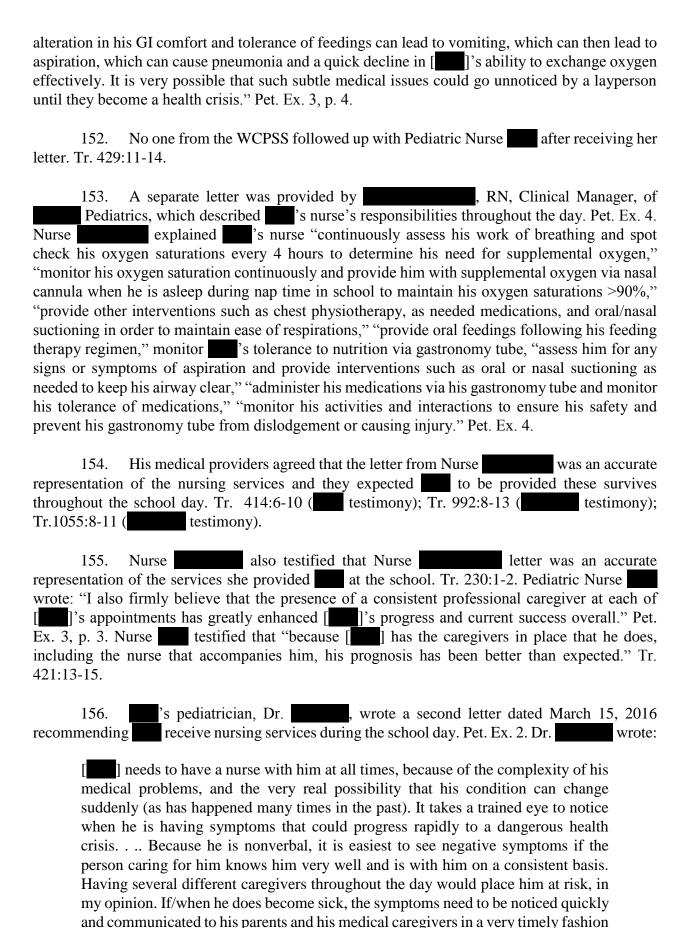
⁷ There was no evidence proffered by the Respondent that school staff were ever trained to perform redical procedures prior to or after the February 2, 2016 IEP meeting.

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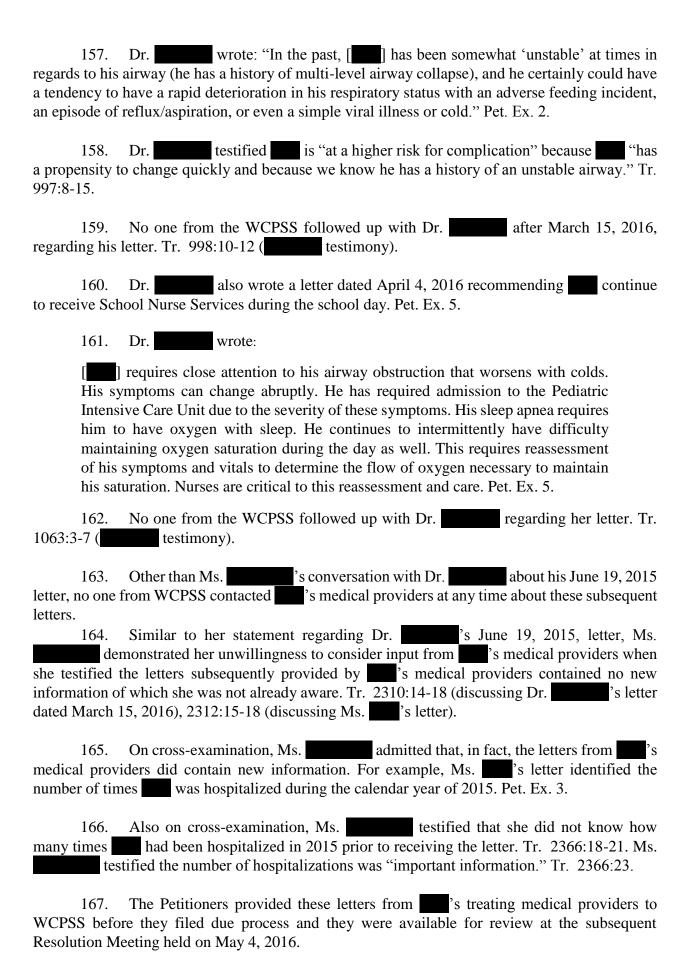




school, and so [she] just thought it was so that they would have orders for her at school." Tr.

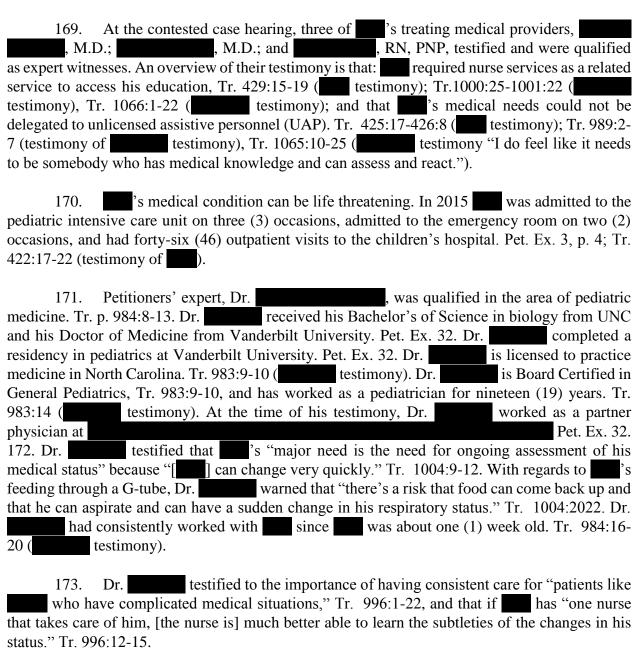


to minimize the change of him having a negative outcome. Pet. Ex. 2.

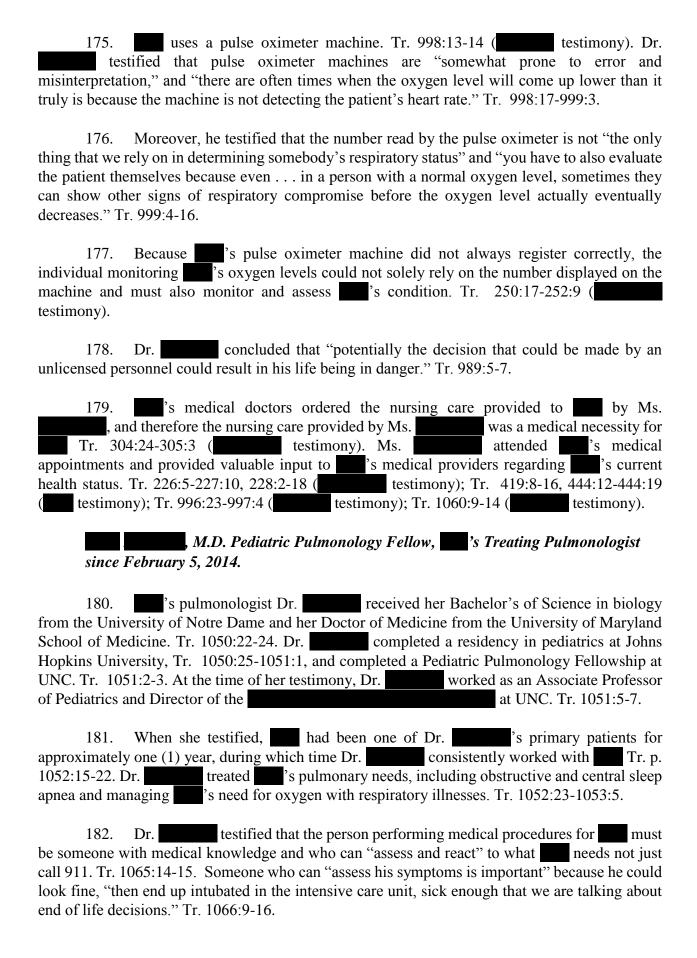


168. At the July 17, 2015 IEP meeting, WCPSS reversed temporarily its decision about School Nurse Services. After that meeting, the Petitioners did not file due process about the placement or other purported IDEA violations. Had WCPSS ultimately agreed at the February 2, 2016 IEP meeting or at the Resolution Meeting to the inclusion of School Nurse Services as a related service for , it is doubtful this case would have proceeded to a full hearing.

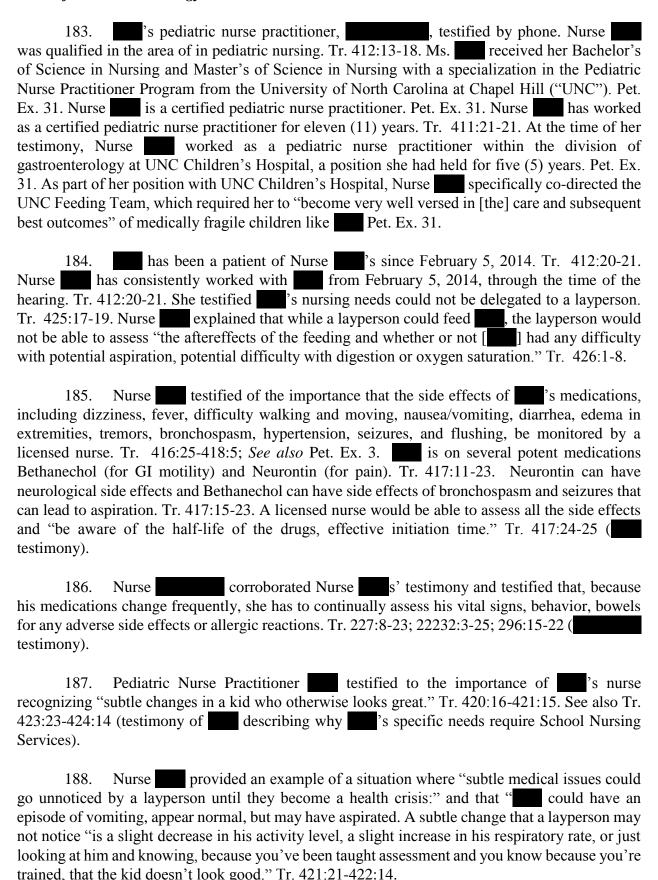
Expert Witnesses' Testimonies that Required School Nurse Services

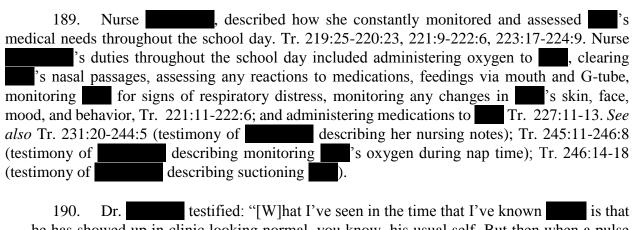


174. Dr. ______ noted that: "[_____] often requires oxygen, and the amount of oxygen that he requires is not always the same—it will change at times when he is ill, and the required amount of oxygen can and will change quickly at times. He needs a professional, trained, familiar nurse in place to be able to recognize when this needs to be adjusted, especially during times of illness." Pet. Ex. 2.



, R.N., P.N.P. Certified Pediatric Nurse Practitioner 's Pediatric Nurse for Gastroenterology





- 190. Dr. testified: "[W]hat I've seen in the time that I've known is that . . . he has showed up in clinic looking normal, you know, his usual self. But then when a pulse oximeter is put on him he is satting (phonetic) very low and then can quickly get into respiratory trouble. And . . . it's not always enough just to put the oxygen on him. You need to be able to react and assess and change for him so that he doesn't end up in the hospital." Tr. 1057:1-8.
 - 191. No medical doctors testified on behalf of WCPSS.
- 192. WCPSS did not seek an independent evaluation of by any licensed physicians to determine whether he required School Nurse Services.
- hours of testimony); 1049:1, 1087:23 ('s 1-hour testimony). The fact that these busy medical professionals and experts in pediatric and pulmonary medicine left their practices and other patients to testify on behalf of lends credibility to their testimony that needs school nurse services and is weighed heavily by the Undersigned. The Undersigned finds compelling that Drs. and both testified that delegating nurse services to a lay person could potentially harm and be life threatening. Pediatric Nurse Practitioner is sphone testimony is equally compelling. Each of these medical providing had been treating for most of his short life; they are specialists in their respective fields, and have no prejudice or bias except for the well-being and safety of a medically fragile child.
- 194. The Undersigned agrees with Dr. school Nurse Services was a "high stake decision" and that "[t]his is a child's life...and it's not just someone who's going to get a bad cold if something goes wrong at school ... this is life or death." Tr. 645:1, 646:16-25. (Testimony).
- 195. The Undersigned finds each of the medical providers qualified and accords greater weight to the testimony of streating medical providers in light of their specialized knowledge of streating medical condition and ongoing need for assessment.

Failure to Replace School Nurse Services with School Health Services

196. WCPSS appears to either assert that a school nurse can delegate School Nurse Services or in the alternative, that the IEP team, at some point, offered School Health Services even though School Health Services as a related service was not mentioned at all in any of the IEP documents in this case.

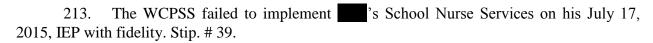
- 197. In the medical field once a physician orders nurse services, the nurse can delegate when appropriate without further authorization. Tr. 2420:2-10. At that point, the delegation decision is the nurse's independent professional responsibility. Tr. 2243:14-25. A doctor's only recourse to prevent delegation would be to withdraw the order underlying the medical care entirely, since a nurse cannot provide the medical care at all absent an order from a doctor. Tr. 2244:1-4.
- 198. In the school setting, an IEP Team's authorization is required for a nurse to delegate medical tasks. That authorization is provided by the IEP team's decision to provide School Health Services rather than School Nurse Services.
- 199. None of "s IEPs included School Health Services as a related service. None of the Prior Written Notices documented that the IEP team had chosen School Health Services.
- 200. Nor is there any evidence that the various IEP Teams discussed adding School Health Services as a related service for Tr. 832:12-14 (testimony).
- 201. Ms. testified that nursing as a related service in an IEP does not only mean the child will have a private duty nurse, but can also be "the implementation of a care plan for a student with a chronic illness." Tr. 2446:24-2447:9.
- 202. required supplemental oxygen and G-tube feedings to access his education. Tr. 2447:24-2448:8. Ms. testified 's needs for supplemental oxygen and G-tube feedings would be covered under nursing as a related service in 's IEP. Tr. 2448:9-11.
- 203. Ms. testified related services on an IEP could include School Health Services. Tr. 2469:7-9. Ms. was not aware that School Health Services were a related service. Tr. 2321:10 ("School Health Service is not a related service.") (testimony).
- 204. In order to provide School Nursing Services or School Health Services to a student, WCPSS requires that a physician's order, signed by the physician, be in place. Tr. 1015:1-6 (The Court and counsel for Respondent discussing the WCPSS' requirements).

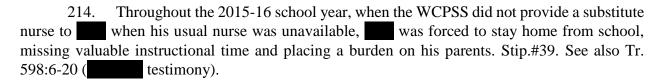
Delegation of Nurse Services Under the Nurse Practice Act

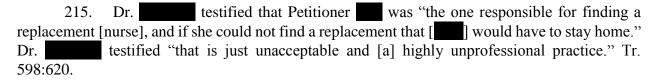
- 205. To the extent that School Health Services is even at issue in this contested case, then the Undersigned must consider if the weight of the evidence supports that tasks cannot be delegated.
- 206. Once a school nurse has a physician order and the IEP team first determines that School Health Services is the appropriate related service, then a school nurse can delegate the medical tasks to qualified school staff. If the IEP decides that School Nurse Services are the appropriate related service for a student, even though a nurse may have independent delegation authority outside a school setting based on the Nurse Practice Act, a school nurse cannot delegate medical tasks for that student's care to unlicensed staff.
- 207. In North Carolina nursing is an independent and comprehensive profession governed by the North Carolina Board of Nursing and various state statutes. Tr. 2235:4-17; Tr. 2403:7-24; Tr. 2415:7-10; Resp. Ex. 44, p.1.

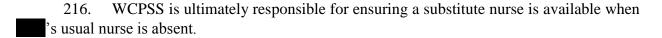
- 208. Nurses have authority to delegate certain medical tasks to other people, including Unlicensed Assistive Personnel (UAP) such as staff members in a school. Tr. 2236:3-9. Delegation in North Carolina is governed by state statute and guidance promulgated by the Board of Nursing, which is authorized by statute to adopt rules and regulations regarding the practice of nursing. See N.C. Gen. Stat. § 90-171.23. Tr. 2406:2-7; Tr. 2407:17-2408:1.
- 209. Delegation to a UAP is permitted when the following criteria are all met: the task (1) frequently recurs in the daily care of a client or group of clients; (2) is performed according to an established sequence of steps; (3) involves little to no modification from one client care situation to another; (4) may be performed with a predictable outcome; (5) does not inherently involve ongoing assessment, interpretation, or decision making which cannot be logically separated from the procedure(s) itself; and (6) does not endanger the client's life or well-being. Stip. Ex. 53, p. 469.
- 210. Multiple witnesses for both parties described the key feature delineating the appropriateness of delegation as being, in effect, whether or not the task will require the UAP to exercise medical judgment. Tr. 435:11-13; 2237:5-7; 2411:8-16; 2416:8-13.
- 211. The Board of Nursing provides a "Decision Tree" to guide nurses in making delegation decisions. Stip. Ex. 53, p. 469. Analysis of delegation must address each of the individual medical tasks a patient may need. In certain situations, some tasks may be delegable while others may not. Tr. 2247:22-2248:3.
- 212. The Board of Nursing's "Decision Tree" might have been helpful for this IEP team members in their decision making process, however, there is no evidence that the IEP team was provided a copy of this "Decision Tree" at any of the IEP meetings. Nor is there any documentation in the records or minutes of the meetings that the school nurses discussed the use of this Decision Tree for this purpose.

Failure to Implement Nursing Services









- 217. WCPSS substituted a safety assistant for the nurse to ride with on the school transport at the February 2, 2016 IEP meeting. Stip. Ex. 18, p. 83. According to the special transportation services description, the safety assistant is necessary for "adult assistance", to assist with oxygen, to observe and assess student's medical needs." Stip. Ex. 18, p. 83. (emphasis added).
- 218. Since School Nurse Services are required as a related service to assess medical needs, School Nurse Services will also be required during transportation and at any other school activity.

Stay-Put School Nurse Services

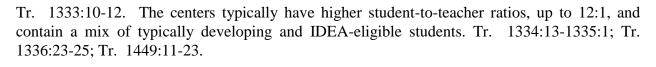
- 219. As the date on which the new IEP would go into effect approached, requested additional time to make arrangements for 's care. Tr. 1110:21-1111:5; Tr. 1198:20-25. The team agreed in a March 3, 2016 IEP meeting to extend nursing as a related service through March 24, 2016, which was the last day before tracked out for three weeks. Stip. Ex. 25, p.121; Tr. 1199:1-10.
- 220. During the three-week track out period following March 24, 2016, Petitioners filed the instant petition and invoked stay put. has received nursing as a related service throughout the pendency of the hearing process.

II. PLACEMENT ISSUE

- 221. WCPSS operates 142 special education preschool classrooms⁸ across the county. Tr. 1331:23; *see* Pet. Ex. 37. These classrooms are embedded within the County's various elementary schools. Tr. 1331:24; Tr. 1333:16-25.
- 222. The continuum of alternative placements for preschoolers in Wake County, from least restrictive to most restrictive is: itinerant services delivered in the child's natural environment (home or daycare), Regular Early Childhood Program ("RECP") part-day or full-day, separate classroom part-day or full-day, hospital. Tr. 1330:11-1331:18; Tr. 1442:1-14.
- 223. The RECP placement is defined in the IEP continuum of alternative placements as at least 50% of children enrolled in a class are nondisabled and do not have an IEP. Whereas a Separate placement includes less than 50% nondisabled children. Stip. Exs. 7, p. 29; 12, p. 57; 18, p. 84; 24, p. 116.
- 224. For three-year-old students who are eligible for special education services but whose least restrictive environment is determined to be an RECP, WCPSS has contracted with various private Developmental Day⁹ centers to provide seats for those children. Tr. 1333:2-15. WCPSS presently has contracts with six private Developmental Day centers around the county.

⁸ WCPSS also has blended preschool classrooms in elementary schools funded by Title I. Tr. 1332:4-8. These classrooms are open only to four-year-old students in their final year of preschool. Tr. 1436:17-1437:8; Tr. 1489:211490:6.

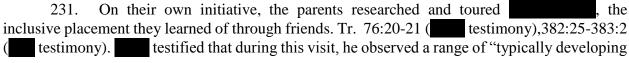
⁹ The terms Developmental <u>Day</u> and Developmental <u>Delay</u> were confusing to the Undersigned and apparently to the Petitioners also. Developmental Day is a RECP placement. Developmental Delay is a subcategory of classrooms available in the Separate placement.



- 225. ("") is a contract Developmental Day center for WCPSS and a RECP placement.
- 226. Respondent contends that although the number of seats in Developmental Day centers is limited and may affect school assignment decisions, WCPSS does not make educational placement decisions based on the availability of seats in the private Developmental Day centers. Tr. 1337:21-1338:6.
- 227. Separate classrooms are designed for different levels and types of needs, and include Developmental Delay, Low Incidence, and Structured Teaching (designed for students with autism) classrooms. Tr. 1332:16-23. Embedding these classrooms within elementary schools purportedly allows for greater inclusion of the students in those programs. Tr. 1333:21-25.
- 228. Developmental Delay classrooms are designed for students with substantial educational needs who cannot be satisfactorily served in the general education setting. They typically have no more than 12 students, with one classroom teacher and two teacher assistants.
- Tr. 1336:20-22. Low Incidence classrooms are designed for students with even greater needs, and typically have no more than 8-9 students with one classroom teacher and two teacher assistants. Tr. 1349:4-10.
- 229. Because WCPSS failed to discuss and complete the IEP section entitled Section VI: Continuum of Alternative Educational Placements¹⁰, the Petitioners did not understand and were uninformed as to all the preschool placements options. It is uncontested that the IEP Teams failed to complete Section VI in all of the IEPs in this case before deciding on a Separate placement for Stip. Exs. 7, p. 29; 12, p. 57; 18. p. 84; 24. p. 116.

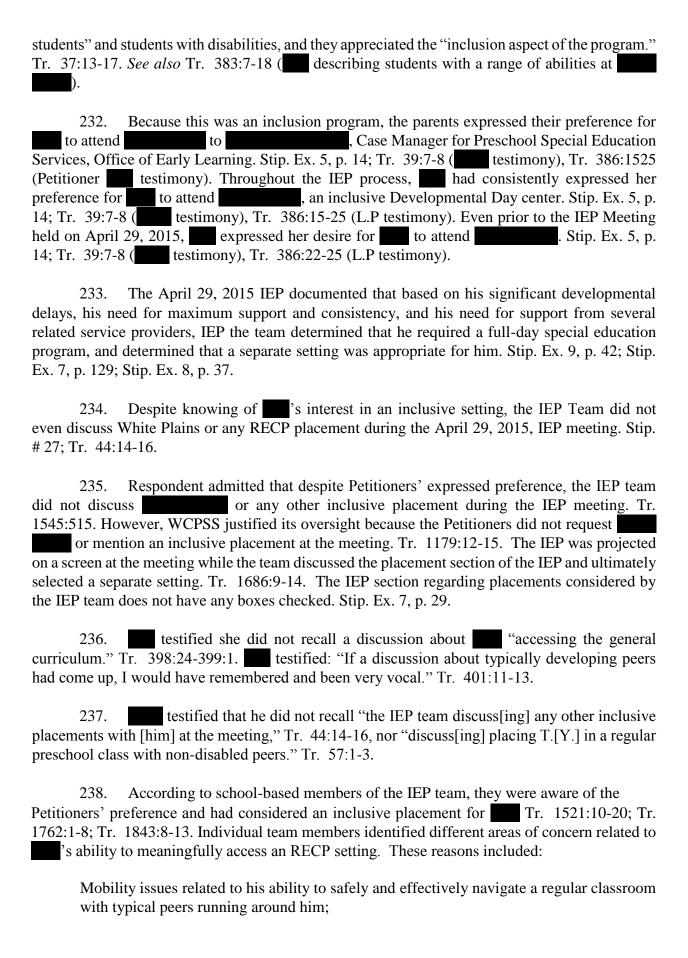
Predetermination of Placement

230. During the transition process, contacted WCPSS to arrange an opportunity to visit preschool classes for and WCPSS only recommended that the parents tour preschool programs that were separate classrooms. Tr. 789:23-790:21 (testimony); Tr. 1408:3-6 (testimony).



¹⁰ According to IEP Section VI. Continuum of Alternative Educational Placements:

[&]quot;Educational placement is determined by calculating the amount of time the student is with nondisabled peers. Regular Early Childhood Program ("RECP") is at least 50% of children enrolled in a class are nondisabled and do not have an IEP. A Special Education Program ("Separate") class includes less than 50 percent nondisabled children." Stip. Exs. 7, p. 29; 12, p. 57; 18. P. 84; 24. P. 116.

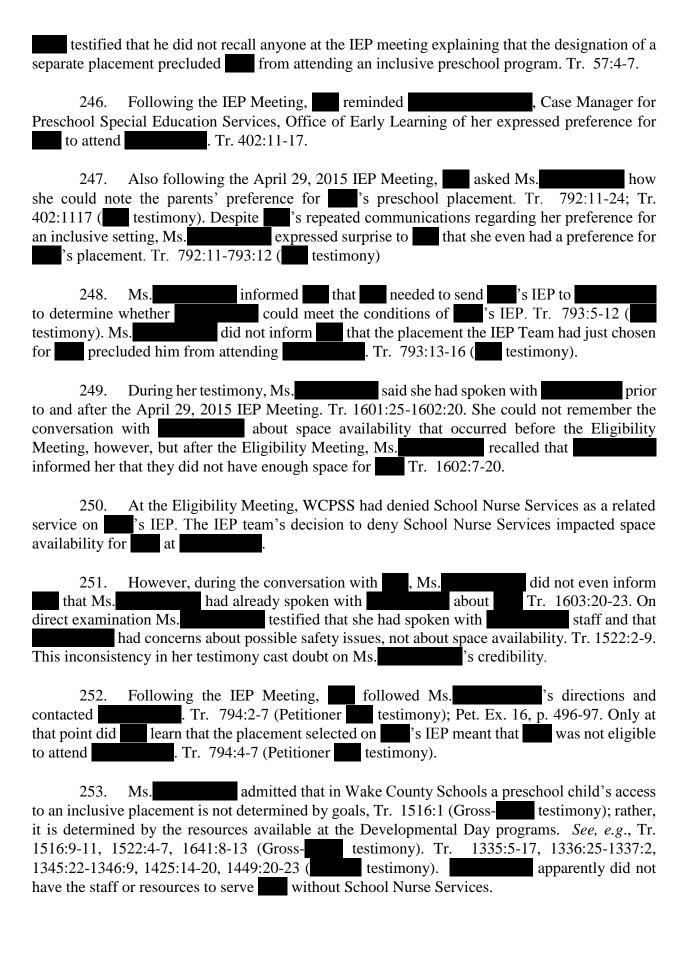


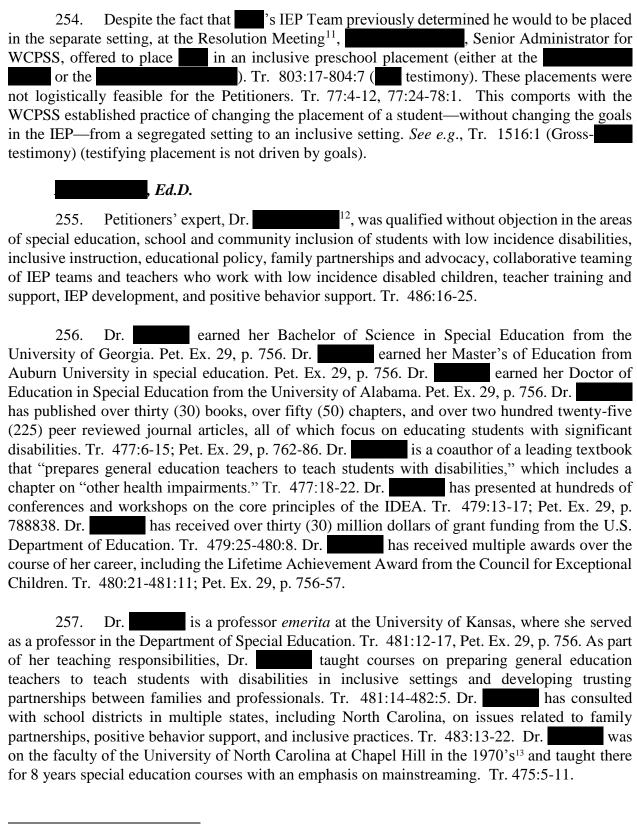
Safety concerns related to his small stature, limited mobility, and dependence on medical equipment, which would be a challenge in any classroom but far more so in a classroom with more students and fewer staff;

Limited attention span, which would require a high-level of individualized attention and would be exacerbated by a larger class size with a more active and noisy population;

Global developmental delays, which would require a high intensity of intervention, significant modification of class activities, and constant repetition. Tr. 1524:21527:1; Tr. 1762:7-15; Tr. 1843:14-19; Tr. 1844:22-1845:1

- 239. Many of these reasons were discussed during the IEP meeting, but these reasons were not explicitly linked to the IEP's decision not to place in an inclusive setting. Stip. Ex. 9, p. 42.
- 240. The members of similar is initial IEP Team had previously placed students in RECP settings. In scase, however, the decision regarding splacement, WCPSS contends, was not a close call. Tr. 1686:15-22; Tr. 1846:20-24. Multiple team members indicated that a Developmental Delay classroom was likely the best setting for given his needs. Tr. 1349:421; Tr. 1544:9-11.
- 241. Concerns about meeting sextensive needs were not unique to wCPSS staff. also explored private school options for Tr. 1208:23-1209:2. Of the three private schools that she contacted, two indicated that they could not meet so needs. Tr. 1209:18-25. The third school indicated that it did not have room for in the upcoming year and therefore did not conduct an evaluation to determine if they could meet so needs. Tr. 1209:12-17
- 242. At the April 2015 IEP meeting, the IEP Team failed to record any alternative placements considered where the IEP instructions indicated: "Check all alternative placements." Stip. Ex. 7, p. 29. testified that the failure was a "clerical error." Tr. 1540:12. WCPSS made 3 clerical errors.
- 243. The PWN failed to document the IEP Team's refusal to consider any placements other than a "PK-Separate Class" for Stip. Ex. 8, p. 37-38.
- 244. 's IEP Team predetermined 's placement in the Developmentally Delay separate classroom setting, where he had no access to nondisabled peers. Stip. ## 25, 26, 27; Stip. Ex. 7, p. 29; Stip. Ex. 8, p. 37-38; Tr. 387:1-3, 398:24-399:5, 401:11-13, 401:19-403:11, 402:1120, (Petitioner testimony); Tr. 44:14-16, 57:1-7 (testimony); 507:23-509:16, 527:2024, 528:25-529:3, 542:6-13, 557:5-11, 599:3-4, 600:13-603:14, (testimony).
- 245. The IEP Team failed to explain to that splacement in the separate setting precluded him from attending testified. Tr. 387:1-3, 401:19-403:11 (testimony), Tr. 57:4-7 (testimony). Tr. testimony) testified that no one at the meeting told her or that could not attend to the separate setting had any connection to separate setting had any connection had a separate set

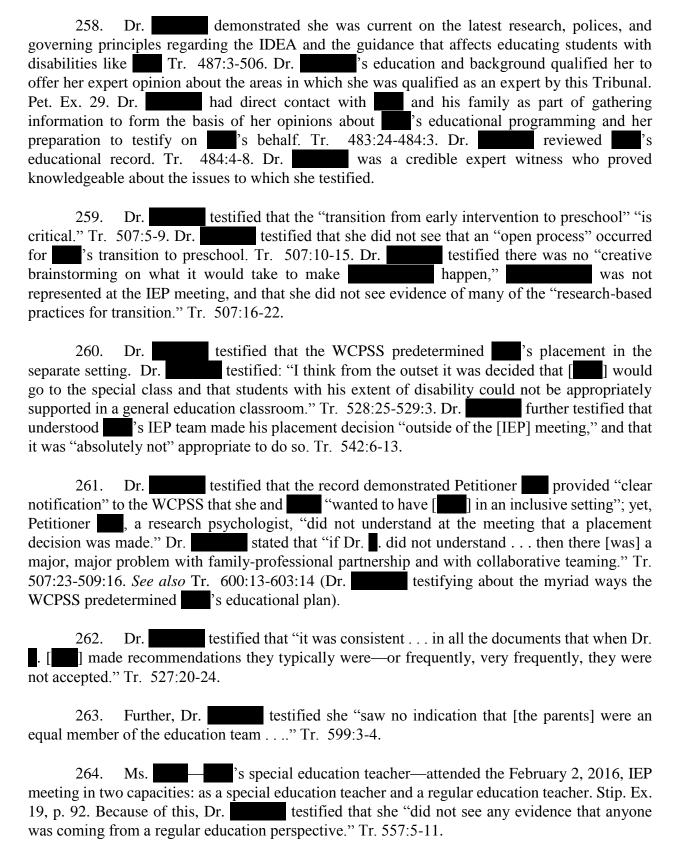




¹¹ The Resolution Meeting was held on May 4, 2016. Unlike mediation negotiations, discussions during a Resolution Meeting are not confidential.

CV is 83 pages long and her expertise in special education was not disputed by Respondent.

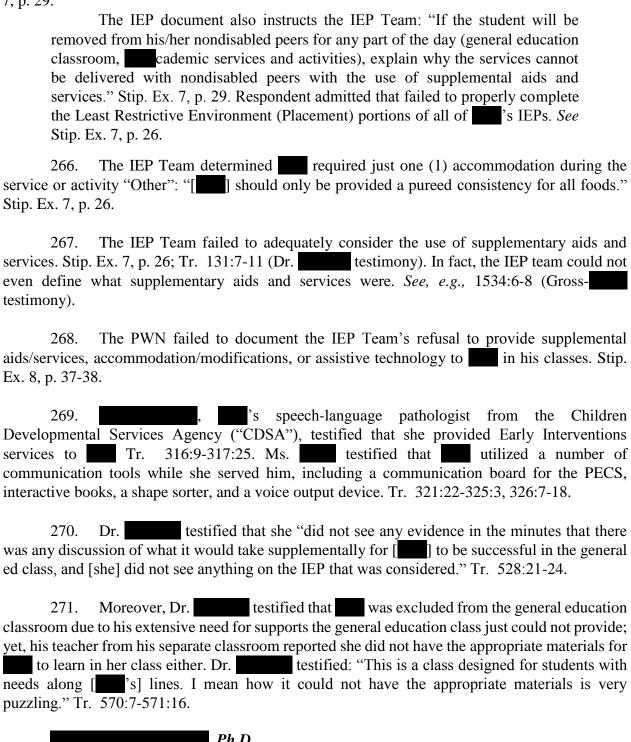
¹³ In the 1970's, Dr. and her husband, along with Senator special education statute (the "Creech Act"). Tr. 475:21-24.



Least Restrictive Environment

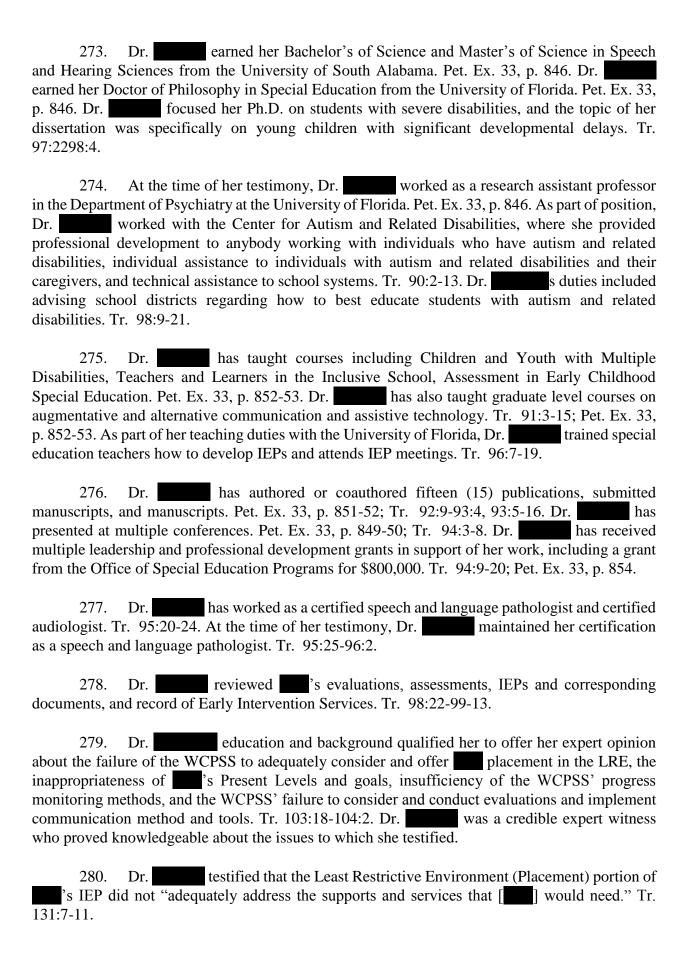
265. The "Continuum of Alternative Educational Placements" portion of Respondent's chosen IEP documents states: "Check all alternative placements considered by the team." Stip. Ex.

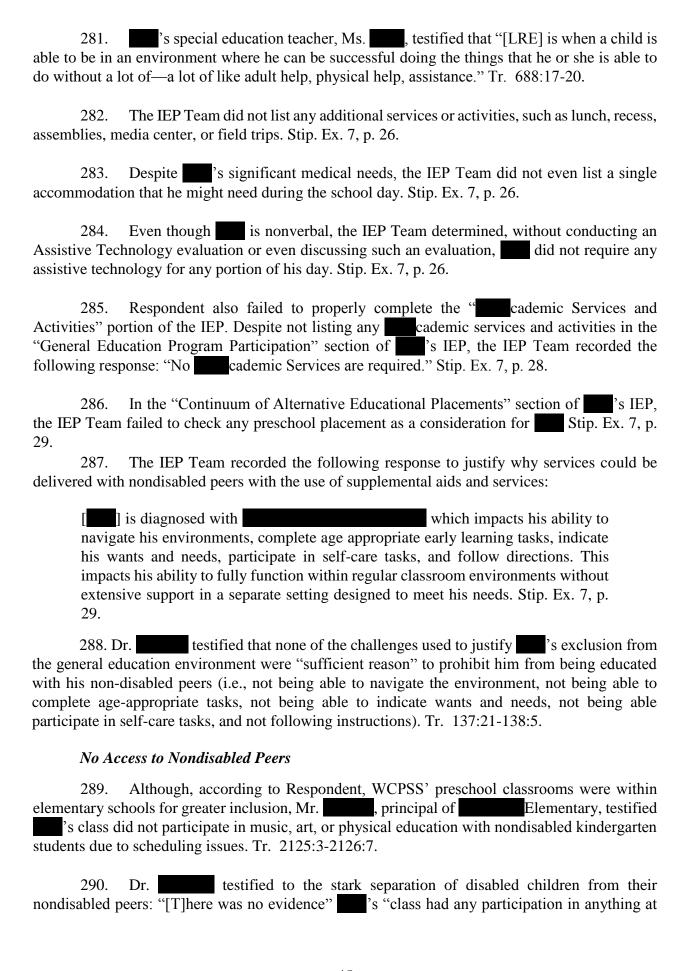
7, p. 29.



, Ph.D

272. Petitioners' other education expert, was qualified in the areas of special education, inclusive education of children with low incidence disabilities, teacher training and support for teaching of children with low incidence disabilities, speech and hearing services, assistive technology, augmentative or alternative communication methods, and IEP development. Tr. 103:18-104:2.





the school. They didn't go to the lunchroom. They didn't play on the same playground. They didn't use the same bathroom." Tr. 533:19-22.

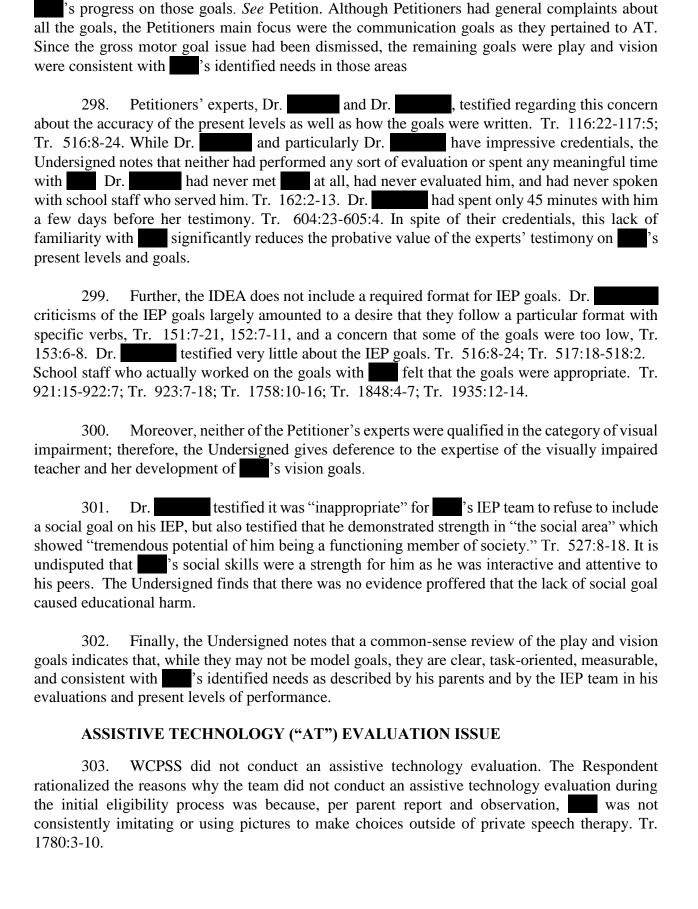
- 291. Dr. testified that the fact that there was no general education preschool classroom at 's school was "a system failure." Tr. 531:17-24.
- 292. Dr. testified that she concluded was not provided a free appropriate public education by the WCPSS. Tr. 603:15-604:12.
- 293. Ms. Porsche 's nurse, described the manner in which students with disabilities were segregated from non-disabled students on the playground: non-disabled students would gather around the fence containing the students with disabilities and watch them. Tr. 252:13-253:13. See also Tr. 2128:22-2129:1 (testimony). Dr. testified that in reviewing Ms. Gregory's deposition describing the separation of children with disabilities on the playground, she "had never seen a fenced-in playground so the kids with disabilities did not have access to the same playground as other kids without disabilities." Tr. 520:2-12.
- 294. Petitioners' experts Dr. and Dr. indicated their belief that could be educated in an inclusive placement. Tr. 133:3-5; Tr. 529:16-18. The Undersigned notes concern regarding the rigidity of their positions against the separate setting: Dr. expressly testified that, in her view, a separate setting was never appropriate, Tr. 132:2-7, except in the case where students display extreme behaviors that disrupt the education of other students, Tr. 161:1223, while Dr. 's examples of when such a setting might be appropriate were limited to students with contagious diseases and intractable behavior problems. Tr. 622:17-23. There was no recognition of a potential academic need for a separate setting, a justification which has been accepted by federal courts for many years. *E.g.*, *Hartmann by Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001-1002 (4th Cir. 1997); *DeVries by DeBlaay v. Fairfax County School Bd.*, 882 F.2d 876, 879 (4th Cir. 1989).
- 295. When the placement decision was made in April 29, 2015, presented as a medically fragile child, small in stature, with limited mobility. The Undersigned appreciates why the IEP team decided not to place in an inclusive setting at that time, especially when School Nurse Services were denied. However, has no access to nondisabled students in the elementary school according to the School Principal and this is due to administrative convenience. The Undersigned finds that this is not consistent with the LRE of the IDEA.

GOAL ISSUE

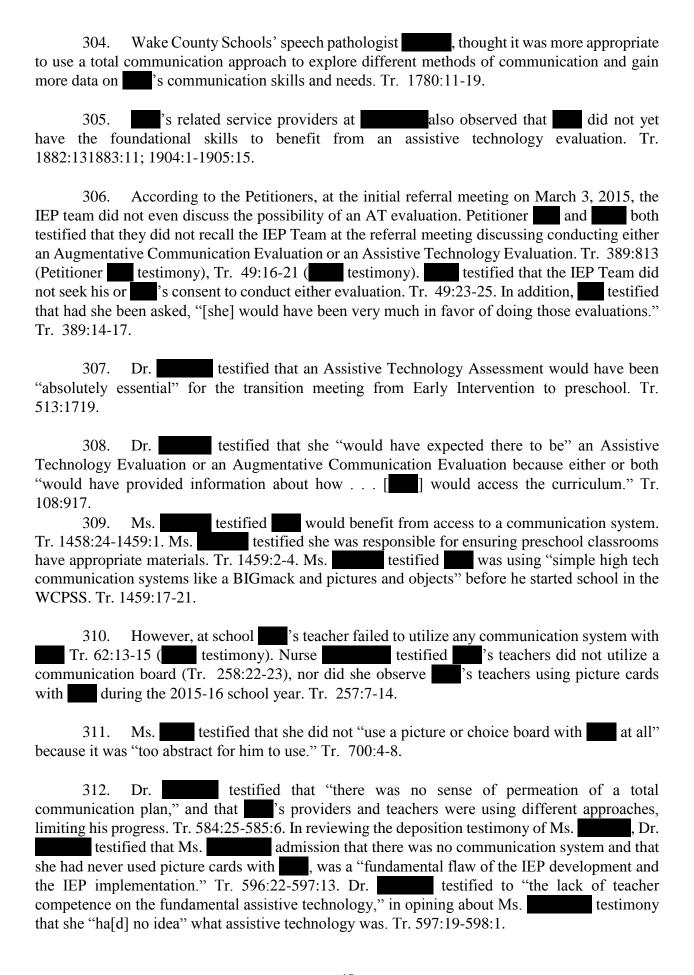
296. At the April 29, 2015 IEP meeting, IEP team developed an Individualized Education Plan for which included seven goals across four areas: communication, motor, vision, and play. Stip. Ex. 7, pp. 21-25. The goals closely tracked the parents' concerns as provided by Petitioners during the meeting. Stip. Ex. 7, p. 19-20; Tr. 63:18-24, 64:14-23, 65:10-66:2, 66:11-24. However, the Petitioners contested the appropriateness of these goals.

The Play and Vision Goals

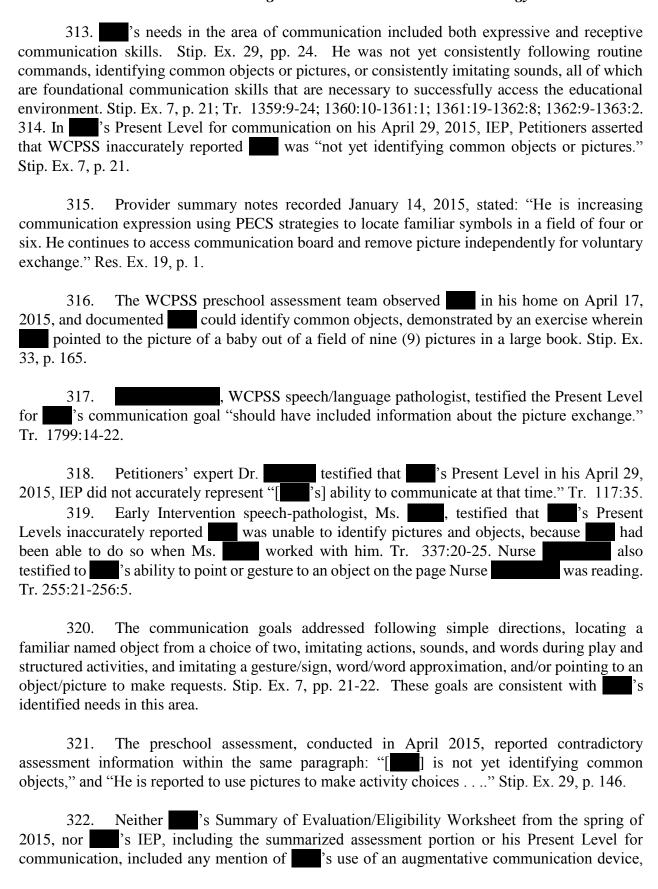
297. The Petitioners assert that size 's IEP goals and Present Levels of Functional Achievement and Academic Performance ("Present Levels") were inaccurate, meaningless, and

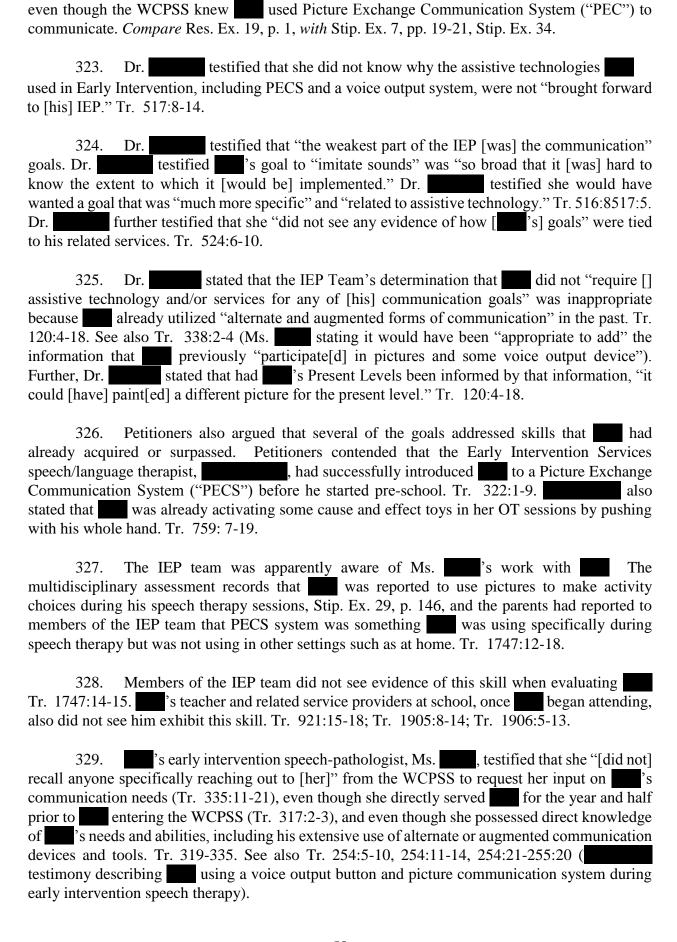


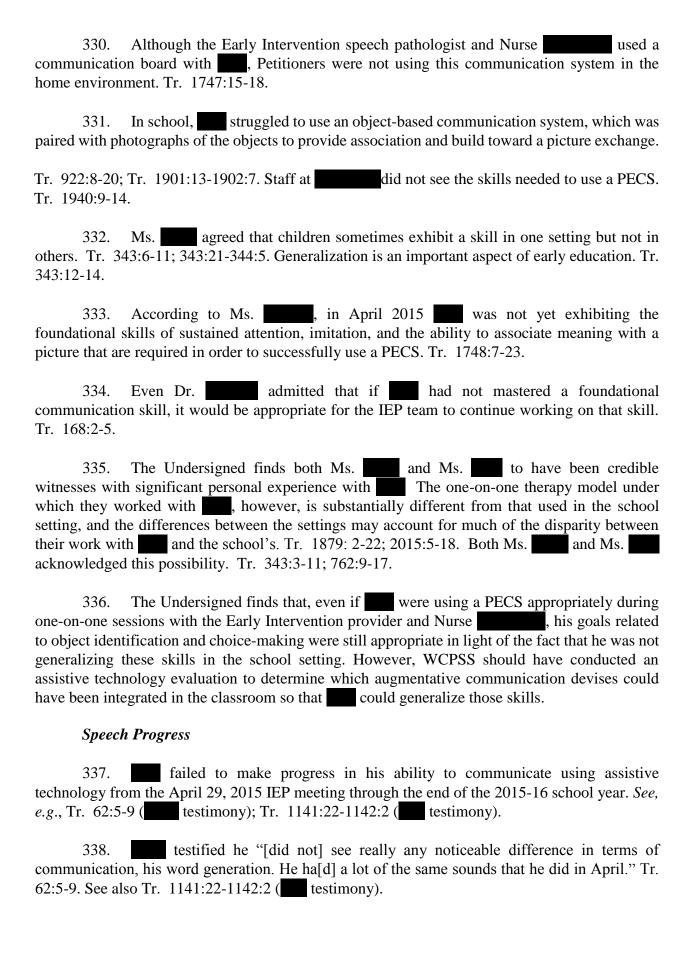
lacked any baseline data from which the IEP Team could develop appropriate goals and measure

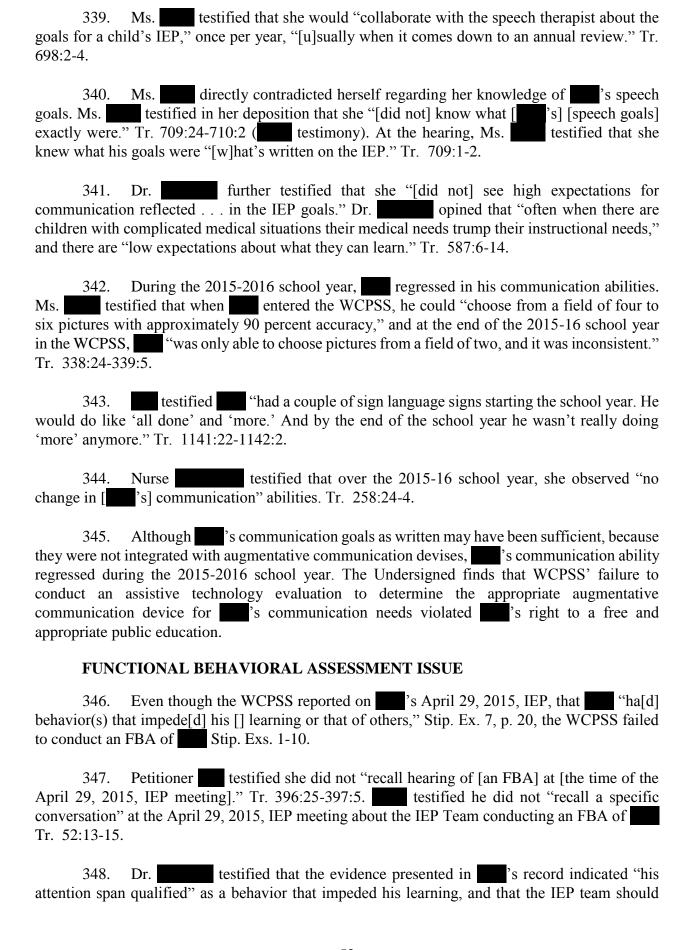


Communication Goals and Augmentative Communication Technology







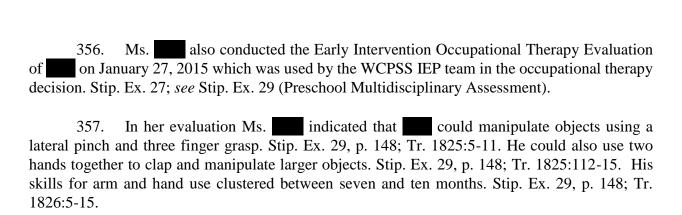


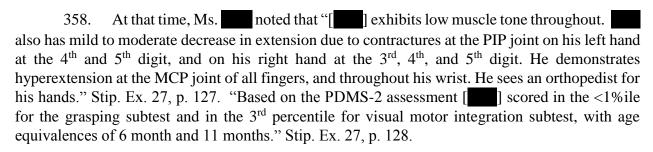
have conducted an FBA and developed a Behavior Intervention Plan (BIP) at the February 2, 2016, IEP meeting to address those needs. Tr. 567:2-13.

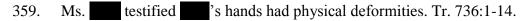
- 349. Respondent's witness, Ms. , testified that the behaviors that impede his learning or that of others are ones that "interrupt the classroom," or "disturb other children," "for example like throwing things, mainly aggressive behaviors." Tr. 688:12-14. Ms. failed to include attention-related behaviors as a part of her definition.
- 350. The Undersigned finds that most three-year-old children have some attentional problems especially when they have not been exposed to the classroom structure. The Undersigned finds that it was reasonable for WCPSS not to conduct a FBA while was transitioning from home to preschool. Even if this was a procedural error, the Petitioners have failed to produce any evidence that this caused any educational harm.

OCCUPATIONAL THERAPY ("OT") ISSUE

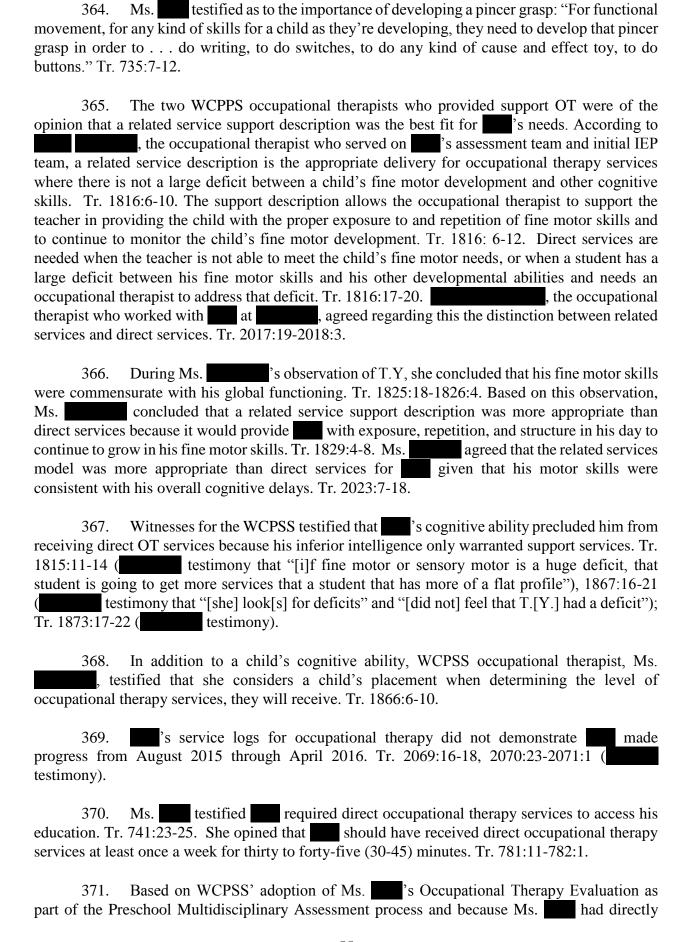
- 351. Petitioners contend that size 's IEP Team did not properly or adequately consider direct OT services for size, nor did the IEP Team provide notice to Petitioner of its decision.
- 352. Petitioner testified that at the April 29, 2015, IEP meeting, the IEP Team discussed providing OT in a support description rather than as a direct service (Tr. 448:9-16); however, the PWN from the meeting does not document the IEP Team's decision to reject direct OT services. Stip. Ex. 8. testified the IEP Team's decision "was conveyed to [her]" as "what he need[ed]," and "was left at that." Tr. 449:19-21. She testified direct services were "brought up as . . . an alternative that wasn't being pursued." Tr. 452:5-7.
- 353. Petitioners' expert, was qualified as an expert in pediatric occupational therapy. Tr. 731:18-19. Ms. received her Bachelor's of Science in Occupational Therapy from Ohio State University. Ms. received her Master's Degree in Health Science from the State University of New York at Stony Brook. Pet. Ex. 30, p. 841. Ms. also obtained certifications in neuro-developmental treatment and advanced neuro-developmental treatment in occupational therapy. Pet. Ex. 30, p. 841. Ms. worked as an occupational therapist with school districts in New Jersey, Minnesota, and New York. Tr. 729:2-4; Pet. Ex. 30, p. 840. Ms. has served as a member of IEP teams in the role of occupational therapist and service coordinator. Tr. 729:5-16.
- 354. At the time of her testimony, Ms. was a licensed occupational therapist in North Carolina. Pet. Ex. 30, p. 841. Ms. had worked as a pediatric occupational therapist for since 1975. Tr. 728:22-24. The majority of Ms. sexperience as an occupational therapist was working with children from birth to six (6) years old. Tr. 729:24-25. Ms. worked as a pediatric occupational therapist in North Carolina from 2008 through the time of the hearing. Pet. Ex. 30, p. 839.
- 355. Ms. was familiar with so conducted multiple evaluations of so occupational therapy needs, as she had conducted multiple evaluations of so occupational therapy needs, beginning when was five (5) months old. Tr. 731:1-13.







- 360. Ms. 's OT evaluation was adopted by WCPSS' preschool assessment team. Stip. Ex. 29, p. 148. WCPSS did not conduct its own OT evaluation and, instead, incorporated Ms. 's OT evaluation in the Preschool Multidisciplinary Assessment. Stip. Ex. 29, p. 147. Based on her evaluation, Ms. recommended receive skilled occupational therapy one (1) time per week for sixty (60) minutes because she "felt he needed the expertise of an occupational therapist to help him develop his fine motor skills, his dexterity, his strength so that he could improve in those areas." Tr. 741:11-22; Stip. Ex. 27, p. 128.
- 361. WCPSS instead provided support OT as a related service instead of direct OT. The Petitioners contested the appropriateness of the provision of OT as a supportive related service rather than direct services in light of Ms. sevaluation and recommendations. Stip. Ex. 18, p. 86.
- 362. At the time of his OT Evaluation, was receiving Early Intervention occupational therapy services for one (1) sixty (60) minute session per week. Tr. 733:5-10 (testimony). As a service for one (1) sixty (60) minute session per week. Tr. 733:5-10 (testimony). As a service for one (1) sixty (60) minute session per week. Tr. 733:5-10 (testimony). As a service for one (1) sixty (60) minute session per week. Tr. 733:5-10 (testimony). As a service for one (1) sixty (60) minute session per week. Tr. 733:5-10 (testified that she worked on the following with the shoulder girdle to give [testified that she worked on the following with the shoulder girdle to give [testified that she worked on hand strengthening exercises with the transfer for the same service for one (1) sixty (60) minute session per week. Tr. 733:5-10 (testified that she worked on the following with the shoulder girdle to give [testified that she worked on the following with the shoulder girdle to give [testified that she worked on hand strengthening exercises with the transfer for the same session per week. Tr. 733:13-10 (testified that she worked on the following with the shoulder girdle to give [testified that she worked on hand strengthening exercises with the transfer for the same session per week. Tr. 733:13-10 (testified that she worked on the following with the shoulder girdle to give [testified that she worked on hand strengthening exercises with the transfer for the same session per week. Tr. 733:13-10 (testified that she worked on the following with the shoulder girdle to give [testified that she worked on the following with the shoulder girdle to give [testified that she worked on hand strengthening exercises with the shoulder girdle to give [testified that she worked on hand strengthening exercises with the shoulder girdle to give [testified that she worked on hand strengthening exercises with the shoulder girdle to give [testified that she worked on hand strengthening exercises with the shoulder girdle to give [testified that she worked
- 363. Ms. testified made progress during the time that she served him at this level of intensity: "His hand function improved. His strength improved. . .. [H]e developed—starting to develop a pincer grasp. He developed a good lateral grasp. He was able to play with more toys. He could close lids. He was starting to string large string with the beads." Tr. 734:1419.



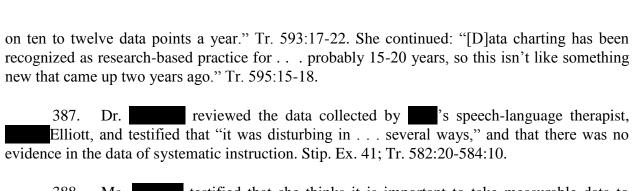
worked with as an OT, the Undersigned finds that Ms. 's expert testimony is credible
and gives higher weight than that of the WCPSS occupational therapists. She testified that
should have had direct OT once a week for 30-45 minutes a session. The Undersigned finds that
WCPSS failed to provide a FAPE by not including direct OT as a related service. Because
Ms. gave of range of session length between 30-45 minutes, the Undersigned finds that 40
minutes is appropriate per session. Based on the 2015-2016 Year-Round Multi-Track Calendar
(Pet. Ex. 38) from August 3, 2015 to April 15, 2016, is owed twenty-five sessions, 40 minutes
each session of compensatory direct occupational therapy.
EXTENDED SCHOOL VEAR ("FSV") ISSUE

- Petitioners contend that during the IEP Meeting held on April 29, 2015, IEP Team failed to properly consider extended school year services ("ESY") for According to the IEP minutes, ESY was discussed at the April 29, 2015 IEP meeting, however, testified that the meeting minutes were incomplete with regard to that discussion because in addition to regression, the IEP team considered whether was on the verge of a critical life skill. Tr. 1551:3-14; Stip. Ex. 9, p. 42.
- While team members had limited memories about the ESY discussion, Tr. 373. 1792:1215; Tr. 1855:17-1856:6; the Respondent contends that based on 's evaluations, no critical emerging skill had been identified, nor was there any evidence that any such skills might be at a risk of loss if did not receive ESY. Tr. 1551:15-22.
- The IEP meeting minutes reflect the Team's explanation of ESY to Petitioner as "[e]xtended school year was explained. [] is not eligible to receive special education services at this time as there is no documentation of regression of skills." Stip. Ex. 9, p. 42. The IEP Team did not explain to the Petitioners that the IEP team had to also consider whether "the benefits [] gains during the regular school year will be significantly jeopardized if [] . . . is not provided with an educational program during extended breaks from instruction" or "[is demonstrating emerging skill acquisition ("window of opportunity") that will be lost without the provision of an educational program during extended breaks from instruction." Stip. Ex. 29, pp. 148, 150; Tr. 57:14-19 (W.Y testimony); see, NC Policy 1501-2.4(b)(ii) &(iii).
- The IEP Team also did not discuss whether the benefits gained during Early Intervention might be significantly jeopardized if was not provided with ESY services. Tr. 784:23-785:2 (testimony).
- The Petitioners asserted that the IEP Team failed to adequately consider ESY 376. services for despite evidence of emerging skill acquisition in several areas. Stip. Ex. 29, pp. 147, 148, 150.
- Both the Preschool Multidisciplinary Assessment ("PMA") of in preparation for his Initial IEP and testimony at the hearing identified emerging skills. See Stip. Ex. 29, pp. 148, 150 (emerging walking and inferior pincher grasp; use of two hands to manipulate objects); Tr. 1768:13-23 (beginning walking is a critical life skill) (Testimony); and, Tr. 114:8-16 (use of symbol to communicate) (Testimony). Testimony). skills including walking and specific fine motor skills. Stip. Ex. 29, pp. 148, 150.

- 378. The regression or the emerging of skills are not the only two issues which the IEP team must consider for ESY purposes. The IEP team must also consider whether the skills lost through regression could be relearned within a reasonable time. NC 1501-2.4(b)(ii). With respect to emerging skill acquisition ("window of opportunity"), the IEP team must determine if that emerging skill "will be lost without the provision of an educational program during extending breaks from instruction." NC 1501-2.4(b)(iii). Along with the emerging skill consideration, it does not appear that the IEP team considered whether the skills lost through regression could be regained. The Petitioners also did not address these issues and failed to offer any evidence that "s skills could not be relearned within a reasonable time or that his emerging skills would be lost because of the lack of ESY.
- 379. The Respondent committed a procedural violation by failing to comply with the ESY requirements. Based on the 2015-2016 Year-Round Multi-Track Calendar, there were only three weeks of track-out break that summer. Pet. Ex. 38.
- 380. Despite this procedural violation, the Petitioners have failed to prove by a preponderance of the evidence that could not recoup regressed skills or that his emerging skills would be lost without ESY during that brief track-out period; therefore, there was no educational harm with respect to this procedural violation.

PROGRESS MONITORING ISSUE

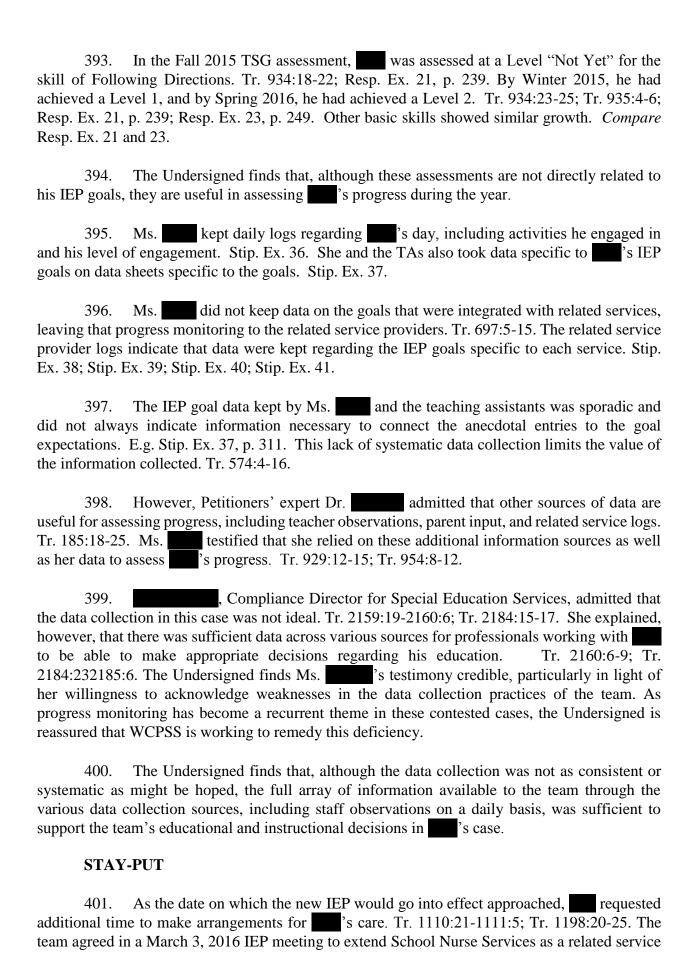
- 381. Petitioners contend that strain 's teachers failed to adequately monitor 's progress.'
- 382. Ms. described her and her TA's method of collecting data: "I ask especially my TAs just to pick a day that they want to do the goal, just random . . .," and collection frequency "was done randomly so that, you know, at least once a week on a goal; sometimes maybe once a month" Tr. 572:1-21 (testimony).
- 383. Ms. testified about her practices in recording skills about the practices in recording skills about the practices in recording skills about the skills. Ms. testified that much of her data failed to include how many opportunities was given on tasks, or the times could not complete a task. Ms. admitted, "[T]he data is not written in here." Tr. 692:3-695:10. In addition, Ms. testified that she did not collect data on the goals for which another teacher also worked with Tr. 697:12-22, 702:19-23, 703:13-19.
- 384. Dr. testified that Ms. 's method of data collection was inappropriate. Tr. 572:22-24. Dr. testified that Ms. 's data collection failed to include benchmarks, task analysis, and daily lessons on 's goals. She testified she was "shocked" because Ms. 's practice was "so far from acceptable." Tr. 572:1-574:17. Ms. collected largely anecdotal data on 's goals. Stip. Ex. 37.
- 385. Dr. went on to describe the "systematic" approach to progress monitoring necessary to ensure a student is learning. Tr. 573:9-581:4.
- 386. Dr. testified that "data are absolutely essential to making instructional decision and to reporting progress, to know if the IEP is being implemented. We don't know based



- 388. Ms. testified that she thinks it is important to take measurable data to determine if a child is making progress. Tr. 1473:14-17.
- 389. Dr. opined that certain goals, such as following direction given cues, "one would think [would have opportunity to practice daily and perhaps multiple times during the day." Tr. 127:19-128:8. ** 's teacher only collected data on that goal a total of thirteen (13) occasions between August 2015 and May 2016. Stip. Ex. 37.
- 390. Ms. reported 's "progress ha[d] been limited." Stip. Ex. 20:94-95. Other school staff acknowledged 's progress to be incremental and inconsistent. Tr. 856:5-17; Tr. 2037:17-2038:5. Nonetheless, school staff testified to discernible progress in multiple areas. Tr. 845:3-6; Tr. 852:25-853:4; Tr. 855:5-10; Tr. 1892:1-1893:7; Tr. 1893:17-1894:22; Tr. 1897:211898:2; Tr. 1899:15-21; Tr. 2022:14-22; Tr. 2023:20-23; Tr. 2025:10-2026:1; Tr. 2026:9-16.

391. Progress was also documented in the records, for example:

- went from walking 25 feet with a walker in September 2015 to walking 200 feet with no assistance in March 2016, improved from working on his balance on level surfaces in September 2015 to climbing up and down steps in March 2016. Stip. Ex. 35, p. 177; Resp. Ex. 25, p. 266.
- was unable to use eye gaze to look at and then reach for a preferred object among two choices in September 2015, but was doing so consistently in March 2016. Stip. Ex. 35, p. 177; Resp. Ex. 25, p. 266.
- exhibited an inability to attend to activities other than circle time in September 2015, but by March 2016 could sustain visual attention to preferred tasks for over a minute. Stip. Ex. 35, p. 177; Resp. Ex. 25, p. 266.
- was only "beginning to engage briefly" with a few toys with adult facilitation in September 2015. By March 2016, he was independently selecting preferred toys from a box and playing with them as well as imitating play based on adult models. Stip. Ex. 35, p. 178; Resp. Ex. 25, p. 267.
- 392. Ms. also used Teaching Strategies GOLD ("TSG") as an assessment of various skill areas. Some of the identified skill areas, such as "Follows Directions," adhere closely to significant in Eq. (2), p. 244. The TSG is administered three times a year and demonstrates a child's progress and how he or she compares to a typically developing child of the same age. Tr. 932:8-12; Tr. 934:18-935:6; Tr. 967:13-18.



through March 24, 2016, which was the last day before tracked out for three weeks. Stip. Ex. 25, p.121; Tr. 1199:1-10.

402. During the three-week track out period following March 24, 2016, Petitioners filed the instant petition and invoked stay put. has received School Nurse Service throughout the pendency of the hearing process.

CONCLUSIONS OF LAW

- 1. To the extent the Findings of Fact contain conclusions of law, or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.
- 2. This Order incorporates and reaffirms the conclusions of law contained in its previous Orders entered in this litigation.
- 3. As the party requesting the hearing, the burden of proof lies with Petitioners and the standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Actions of local board of education are presumed to be correct and Petitioners' evidence must outweigh the evidence in favor of the Board's decisions. *See* N.C.G.S. § 115C-44(b).

Jurisdictional

- 4. The Petitioners and Respondent named in this action are properly before this Tribunal, and that this Tribunal has personal jurisdiction over them.
- 5. The Petitioners and Respondent named in this action are correctly designated and have been properly noticed of this hearing.
- 6. Office of Administrative Hearings has jurisdiction over this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its implementing regulations, 34 C.F.R. §§ 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed.
- 7. The IDEA is the federal statute governing the education of students with disabilities.
- 8. The WCPSS is the local education agency (LEA) receiving funds pursuant to the IDEA.
- 9. The controlling state law for students with disabilities is N.C. Gen. Stat. § 115C, Article 9 and the corresponding state regulations.

General Legal Framework

10. The appropriateness of a student's educational program is decided on a case-by-case basis, in light of the individualized consideration of the unique needs of the child. See

Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Under Rowley, the Board is required first to comply with the procedures set forth in the IDEA in developing an IEP, and second, to provide a disabled student with educational instruction that is uniquely designed to meet the student's needs through an IEP that is reasonably calculated to enable him to receive educational benefit. See Rowley, 458 U.S. at 176. If both requirements are met, "the State has complied with the obligations imposed by Congress and the courts can require no more." Id. at 207.

11. The IDEA contains a number of critical, procedural safeguards to provide notice to parents of decisions regarding their children and "an opportunity [for parents] to object to those decisions." *G. ex rel. R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 299 (4th Cir. 2003) (quoting *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 527 (4th Cir. 2002) (internal citation omitted)). Should the LEA fail in its obligations under the IDEA, parents are afforded the right to file a due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6).

Procedural Errors

- 12. For a procedural defect in the development of an IEP to entitle a claimant to relief, the defect must result in a loss of educational benefit and not simply be a harmless error. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 684 (4th Cir. 2007).
- 13. A child is denied a FAPE when an IEP Team commits a procedural violation that "result[s] in some loss of educational benefit or opportunity" and is not "simply . . . a harmless error." *A.K. ex rel. J.K. v. Alexandria City Sch.*, 484 F.3d 672, 684 (4th Cir. 2007); *see also Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2000) ("[A] school district's failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child or his parents."). Only when the court finds that the "procedural violation has resulted in such substantive harm, and thus constituted a denial of [the child's] right to a FAPE, may [it] 'grant such relief as the court determines is appropriate." *Knable*, 238 F.3d at 764 (citing 20 U.S.C. § 1415(e)(2)).
- 14. A substantive procedural violation is one that "seriously infringe[s] the parents' opportunity to participate in the IEP formulation process," *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) (citations omitted), or causes the child to lose any educational opportunity, *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).
- 15. To the extent that the procedural violations do not actually interfere with the provision of FAPE, these violations are not sufficient to support a finding that a district failed to provide a FAPE. *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997). If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations. *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir.1990).
- 16. In addition, state law dictates that "the decision of the administrative law judge shall be made on substantive grounds based on a determination of whether the child received a

free appropriate public education." N.C. Gen. Stat. § 115C-109.6(f). "In matters alleging a procedural violation, the hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participation in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." N.C.G.S. § 115C-109.8(a).

- 17. A substantive procedural violation is one that "seriously infringe[s] the parents' opportunity to participate in the IEP formulation process," *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No.* 23, 960 F.2d 1479, 1484 (9th Cir. 1992) (citations omitted), or causes the child to lose any educational opportunity, *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).
- 18. "Multiple procedural violations [] may cumulatively result in the denial of FAPE even if the violations considered individually do not." *L.O. v. N.Y.C. Dep't of Educ.*, No. 15-1019, at *18 (2d Cir. 2016) (internal quotation marks omitted) (quoting *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 190 (2012)).

Parental Participation

- 19. Parents must be afforded the opportunity to participate in the IEP meeting. 34 C.F.R. §300.322(a). N.C.G.S. §115C-109.3(a) guarantees the parent the right "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to that child."
- 20. A denial of meaningful participation by the parent, including predetermination by the IEP team, is a procedural violation. *See, e.g., Hanson ex. rel. Hanson v. Smith*, 212 F.Supp.2d 474, 486 (D. Md. 2002).
- 21. The IDEA's procedural requirements are purposefully designed to ensure that parents can meaningfully participate in the process of developing an IEP for their child. *See Rowley*, 458 U.S. at 205–06 ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.").
- 22. Parents are denied their right to meaningfully participate in the development of their child's IEP when a school district predetermines the child's placement prior to an IEP meeting. See Spielberg v. Henrico Cnty. Public Sch., 853 F.3d 256 (4th Cir. 1988) (finding the school district's decision to change a student's placement before the IEP meeting violated the Education for All Handicapped Children Act, the predecessor to the IDEA); R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1188 (11th Cir. 2014) ("Predetermination occurs when a state makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team.").
- 23. Prior to an IEP Meeting, members of the IEP Team may engage in "informal or unscheduled conversations," "conversations on issues such as teaching methodology, lesson plans, or coordination of service provision," and "preparatory activities . . . to develop a proposal or

response to a parent proposal that will be discussed at a later meeting." *See* 34 C.F.R. § 300.501(b)(3). However, "any pre-formed opinion the state might have must not obstruct the parents' participation in the planning process." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014) (citation omitted).

- 24. "To avoid a finding of predetermination, there must be evidence the [school district] has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014) (citing *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004)). A school district may weaken a claim of predetermination by providing sufficient evidence that the IEP team considered multiple placements, *see A.E. v. Westport Bd. of Educ.*, 463 F. Supp. 2d 208, 213 (D. Conn. 2006), or that the IEP team made changes to the IEP at the meeting in response to the parents' input, *see*, *e.g.*, *T.P. ex rel S.P. v. Mamaroneck Union Free Sch.*, 554 F.3d 247, 253 (2d Cir. 2009). There was evidence presented at hearing that WCPSS would not be swayed by sparents' opinions, and WCPSS did not have an open mind with regard to placement.
- 25. A child is denied a FAPE when an IEP Team commits a procedural violation that "result[s] in some loss of educational benefit or opportunity" and is not "simply . . . a harmless error." *A.K. ex rel. J.K. v. Alexandria City Sch.*, 484 F.3d 672, 684 (4th Cir. 2007); *see also Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2000) ("[A] school district's failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child or his parents."). Only when the court finds that the "procedural violation has resulted in such substantive harm, and thus constituted a denial of [the child's] right to a FAPE, may [it] 'grant such relief as the court determines is appropriate." *Knable*, 238 F.3d at 764 (citing 20 U.S.C. § 1415(e)(2)).
- 26. A substantive procedural violation is one that "seriously infringe[s] the parents' opportunity to participate in the IEP formulation process," *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No.* 23, 960 F.2d 1479, 1484 (9th Cir. 1992) (citations omitted), or causes the child to lose any educational opportunity, *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

Prior Written Notice to Parents

27. The IDEA requires that the Prior Written Notice include:

a description of the action proposed or refused by the agency;

an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

a description of other options considered by the IEP Team and the reason why those options were rejected; and

a description of the factors that are relevant to the agency's proposal or refusal. 20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b).

28. Regardless of whether all team members agree to the change, the agency must provide notice as it "allows the parent time to fully consider the change and determine if he/she has additional suggestions, concerns, questions, and so forth." *Letter to Lieberman*, Office of Special Education and Rehabilitative Services (Aug. 15, 2008).

Appropriateness of the IEP

- 29. School districts are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. *Rowley*, 458 U.S. at 189-90. The modest *Rowley* standard requires that a Board offer children with disabilities a basic floor of opportunity and some educational benefit; a district is not required to maximize a student's educational performance. *See e.g. Rowley*, 458 U.S. at 188-89 (1982); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir.2004).
- 30. The public school district satisfies this test if it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (quoting *Rowley*, 458 U.S. at 203); *see also Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987) (underscoring the notion that a free and appropriate education "does not mean that a local school board must provide the *most* appropriate education for each child.").
- 31. "[T]he [IDEA] does not require the 'furnishing of every special service necessary to maximize each handicapped child's potential." *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997) (quoting *Rowley*, 458 U.S. at 199-200).

Least Restrictive Environment

- 32. In addition to IDEA's requirement that the state provide each student with some educational benefit, the student must be placed in the least restrictive environment (LRE) appropriate for the student to achieve educational benefit. *See, e.g., A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004); *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir. 2003).
- 33. The IDEA requires that "[i]n determining the educational placement of a child with a disability, *including a preschool child with a disability*, each public agency must ensure that the

placement decision . . . [i]s made in conformity with the LRE provisions of this subpart, including 34 C.F.R. 300.114 through 34 C.F.R. 300.118. 34 C.F.R. § 300.116 (emphasis added).

- 34. "To comply with the IDEA, a school district must make available a full continuum of placements to meet each disabled child's individual needs. 34 C.F.R. § 300.115(a). This continuum must include alternative placements <u>and</u> "make provision of supplementary services . . . to be provided in conjunction with regular class placement." 34 C.F.R. § 300.115(b) (emphasis added). As a recipient of IDEA funds, the WCPSS was required to first consider educating in the regular educational environment with the use of supplementary aids and services.
- 35. The Fourth Circuit in *DeVries v. Fairfax County School Board* emphasized that the mainstreaming of children with disabilities is "not only a laudable goal but is also a requirement of the Act" and adopted the *Roncker* standard. *DeVries*, 882 F.2d. at 879 (citing *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (requiring a court to "determine whether the services which make that placement [at a segregated facility] superior could be feasibly provided in a nonsegregated setting")).
- 36. "In short, a student with disabilities must be placed 'in the least restrictive environment that will provide the child with a meaningful educational benefit." *H.L. v. Downingtown Area Sch. Dist.*, No. 14-3678, 2015 WL 3621853, at *7 (3d Cir. June 11, 2015) (citing *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 556–57 (3d Cir. 2010)).
- 37. If "a school 'has given no serious consideration to including the child in a regular class with . . . supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated' the LRE requirement." *H.L.*, 2015 WL 3621853, at *3 (citing *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1216 (3d Cir. 1993)).
- 38. Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115(a). Under the IDEA, children with disabilities are to be educated with children who are not disabled only "to the maximum extent appropriate." *Hartmann*, 118 F.3d at 1001; 20 U.S.C. § 1412(a)(5)(A).
- 39. The school district may consider "[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment . . . only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2)(ii) (emphasis added).
- 40. A child may not be "removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum." 34 C.F.R. § 300.116(e). Nor may a school district rely solely on the following factors when determining a child's placement: category of disability; severity of disability; configuration of delivery system; availability of educational or related services; availability of space; and administrative convenience. *OSEP Memorandum 95-9*. The only inclusive preschool options available for children turning three (3) in the WCPSS is in one of six (6) developmental day programs; however, the WCPSS has an established practice of denying a child placement in an inclusive setting in a

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developmental day program if the program indicates that it does not have the resources to serve the child.

- 41. Mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting. *Hartmann*, 118 F.3d at 1001; *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir.1989).
- 42. Districts are not required to attempt a mainstream setting before placing a child in a more restrictive setting. *See Letter to Cohen*, 25 IDELR 516 (OSEP, August 6, 1996).
- 43. The LRE requirement creates a presumption in favor of mainstreaming. The IDEA clearly articulates a presumption that disabled children will not be segregated from their nondisabled peers and will be educated in the least restrictive environment ("LRE"):

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(A); see 34 C.F.R. § 300.114(a).

- 44. The least restrictive environment provision of the IDEA "sets forth a 'strong congressional preference' for integrating children with disabilities in regular classrooms," rather than placing the child in a "segregated environment." *Oberti*, 995 F.2d at 1214 (3rd Cir. 1993); *see also Devries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989) ("The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate.").
- 45. "The fact that the provision only creates a presumption, however, reflects a congressional judgment that receipt of such social benefits is ultimately a goal subordinate to the requirement that disabled children receive educational benefit." *Hartmann*, 118 F.3d at 1002. As such, academic benefit takes primacy over social benefit if the two goals are in conflict.
- 46. A district that does not operate a regular preschool program is not required to initiate one simply in order to create an LRE opportunity for a disabled child. According to 34 C.F.R. § 300.552, a child is to be educated in the school that he or she would otherwise attend if not disabled unless the IEP for that child requires some other placement. The commentary to this regulation provides:

Public agencies that do not operate programs for nondisabled children are not required to initiate such programs to satisfy the requirements regarding placement in the LRE

embodied in Sections 300.550–556. For these public agencies, some alternative methods for meeting the requirements include:

- Providing opportunities for participation (even part time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);
- Placing children with disabilities in private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children; and
- Locating classes for preschool children with disabilities in regular elementary schools.
- In each case the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met, based on the child's IEP, and meets all of the other requirements of Sections 300.340–300.350 and Sections 300.550–300.556.

34 C.F.R. § 300.552, Note (1996). *See also Dear Colleague Letter*, 58 IDELR 290 (OSESP, February 29, 2012).

47. Further, while medically fragile students have the same rights to LRE as any other student with a disability, student safety and the risk of harm is a critical consideration in determining the least restrictive environment appropriate for a student. See 34 C.F.R. 300.552(d) (stating that the public agency must ensure that "[i]n selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs"); Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ., 397 F.3d 77, 93 (2d Cir. 2005) ("Congress did not intend to exclude from consideration any subject matter—including safety concerns—that could interfere with a disabled child's right to receive a free appropriate public education.").

IEP Goals

- 48. An Individualized Education Program (IEP) is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with" the IDEA. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320(a).
- 49. The IEP is "[t]he primary vehicle for implementing" the IDEA. *Honig*, 484 U.S. at 311. The IEP is "[p]repared at meetings between a representative of the local school district, the child's teacher, the parents or guardians, and, whenever appropriate, the disabled child," and the IEP "sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Id*.
- 50. "[A]n IEP must provide a child with more than minimal, trivial progress." O.S. v. Fairfax Cnty. Sch., 804 F.3d 354, 359 (4th Cir. 2015). "[T]he door of public education must be opened in a meaningful way." M.W. ex rel. S.W. v. N.Y.C. Dept. of Educ., 725 F.3d 131,143 (2nd

Cir. 2013) (quoting *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008)).

- 51. The IDEA requires that every IEP contain "[a] statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum," "[a] statement of measurable annual goals," and a description of "[h]ow the child's progress toward meeting the annual goals . . . will be measured." 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320(a)(1)–(3). In addition, the IDEA requires that the goals developed are individualized, and target the unique needs of the child. 20 U.S.C. §§ 1401(29), 1414(d)(1)(A); 34 C.F.R. § 300.39(a)(1); N.C. Policy §§ 1500-2.34(a)(1), 1503-4.1(a).
- 52. A "well-written IEP goal must pass the 'stranger' test[:] Could a stranger to the IEP goal be able to implement the goal, be able to implement the assessment of student's progress on the goal, and be able to determine whether the student's progress was satisfactory"? *Mason City Comm. Sch. Dist.*, 46 IDELR 148, 106 LRP 51522 (SEA IOWA 2006).
- 53. Goals that are vague or generally immeasurable are contrary to the IDEA and fail to provide a FAPE to a student. See e.g., *Independent Sch. Dist. No. 701 v. J.T.*, 45 IDELR 92, pp. 3, 7, 2006 WL 517648 (D. Minn. 2006) (an IEP's statement that a student would "improve his functional academic skills from a level of not completing assignments independently to a level of being able to read, write and do basic math skills independently" was too vague to permit measurement of the student's progress); *Anchorage Sch. Dist.*, 51 IDELR 230 (SEA AK 2008), aff'd, 54 IDELR 29 (D. Alaska 2009) (the Hearing Officer determined that the lack of clear, measurable goals in a child's IEP precluded an objective measurement of the child's progress).
- 54. "The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need." *Los Angeles Unified Sch. Dist.*, 110 LRP 34448 (SEA CA 2010) (citing 34 C.F.R. § 300.320(a)(2)(i)-(ii)(2006); 34 C.F.R. part 300, App. A, Q.1 (2006)).

Implementation of IEPs

55. "A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Houston Ind. School Dist. V. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Evaluations

- 56. The IDEA mandates that the initial evaluation to determine if a child is a child with a disability "must consist of procedures—(I) To determine if the child is a child with a disability . . . ; and (II) To determine the educational needs of the child." 20 U.S.C. § 1414(a)(1)(C)(i); 34 C.F.R. § 300.301; N.C. Policy 1503-2.2.
- 57. The evaluation must be sufficiently comprehensive to identify all of the child's special education needs, whether or not commonly linked to the disability category in which the child has been identified. 20 U.S.C. §§ 1414(b)(1)-(3), 1412(a)(6)(B); 34 C.F.R. § 300.304. The

evaluation must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." 20 U.S.C. § 1414(b); 34 C.F.R. § 300.304.

58. Where a child's behavior impedes the child's learning, the IEP Team must "consider the use of positive behavior interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.324(a)(2)(i).

RELATED SERVICES

59. An IEP must include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child . . . (aa) to advance appropriately toward attaining the annual goals; (bb) to be involved in and make progress in the general education curriculum . . and to participate in extracurricular and other nonacademic activities; and (cc) to be educated and participate with other children with disabilities and nondisabled children." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). The IDEA defines related services as "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." 34 C.F.R. § 300.34(a). These services include "speech-language pathology and audiology services, psychological services, [and] physical and occupational therapy." 34 C.F.R. § 300.34(a).

Medical Services and School Nursing Services

- 60. If a child has a medical related disability that impacts a child's need for special education and related services, then "medical services" for diagnostic/assessment purposes can be a related service. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(b)(5); NC Policy 1500 (b)(5). This "medical service" must be provided by a licensed physician. *Id.* (emphasis added)
- 61. A "medical service" is available as a related service for diagnostic or evaluation purposes. NC Policy 1500-2.28(c)(5); 34 C.F.R. § 300.34(c)(5). These are "services provided by a <u>licensed physician</u> to determine a child's medically related disabilities that results in the child's needs for special education and related services. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(c)(5) (emphasis added). WCPSS did not use a licensed physician to determine services. Instead, WCPSS relied exclusively on Ms. did not provide an evaluation report. Determination of the child's educational needs shall be made by a team of qualified professionals and the parent. 20 U.S.C. § 1414(b)(4)(A). A copy of the evaluation report must be given to the parent. 20 U.S.C. § 1414(b)(4)(B). To determine eligibility and educational need, each public agency must draw upon information from a variety of sources including parent input, information about the child's physical condition and ensure that information obtained from all these sources is documented and carefully considered. 20 U.S.C. § 1414(b)(4)&(5); 34 C.F.R. § 300.302(c)(i)&(ii).
- 62. The federal regulations under the IDEA include "School Nurse Services" and "School Health Services" as related services. These are "health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP." 34 CFR § 300.34(c)(13).
- 63. The distinction between the two is that School Nurse Services must be provided by a qualified school nurse, while School Health Services may be provided by either a qualified school

nurse or the nurse can delegate these tasks to other qualified person. *Id.* In effect, School Nurse Services are necessary in an IEP only when the specific medical care needed to allow a student to access their special education services are *required* to be provided by a qualified nurse rather than trained staff.

- 64. Because School Nurse Services and School Health Services are related services, the IEP team retains final decision making authority over whether a student's individualized needs include School Nurse Services or School Health Services. *See* 34 CFR § 300.34; 34 CFR § 300.320. Once School Nurse Services is chosen by the IEP Team, the nurse loses any authority over delegation of medical tasks.
- of a nurse as opposed to another trained individual; in order for a qualified nurse to be necessary, the child must *require* nursing services in order to access special education services during the school day. *See, e.g., Gwinnett Cnty. Sch. Dist.*, 64 IDELR 92 (Ga. SEA 2013) ("Though Plaintiff presented evidence that he is perhaps more comfortable at a school where the clinic is staffed by a school nurse rather than a clinic worker, no evidence was presented that his medical needs require access to a school nurse or that the provision of nursing services as part of his IEP is necessary in order for Plaintiff to receive a FAPE."); *Sto-Rox Sch. Dist.*, 26 IDELR 71 (Pa. SEA 1997) (holding that child with multiple disabilities did not require one-to-one nursing services in order to receive an educational benefit and noting testimony from his private duty nurse that she only helped him with daily living activities and there was no evidence of respiratory difficulties requiring nursing intervention).

School Health Services and Nurse Delegation Authority

- 66. Once the IEP team chooses School Health Service, a school nurse can delegate medical tasks without IEP team approval.
- 67. Pursuant to its statutory authority, the Board of Nursing has adopted regulations governing the practice of nursing. Under those regulations, "[t]he repetitive performance of a common task or procedure which does not require the professional judgment of a registered nurse or licensed practical nurse shall not be considered the practice of nursing for which a license is required." 21 NCAC 36.0221(b). This provision allows for delegation to unlicensed personnel. See also 21 NCAC 36.0224(i)(3-4).
- 68. "Tasks may be delegated to an unlicensed person which: (1) frequently recur in the daily care of a client . . .; (2) are performed according to an established sequence of steps; (3) involve little or no modification from one client-care situation to another; (4) may be performed with a predictable outcome; and (5) do not inherently involve ongoing assessment, interpretation, or decision-making which cannot be logically separated from the procedure(s) itself." 21 NCAC 36.0221(b).
- 69. The regulations require that "[c]lient-care services which do not meet all of these criteria shall be performed by a licensed nurse." 21 NCAC 36 .0221(b).

Occupational Therapy ("OT") as a Related Service

- 70. Occupational therapy means services provided by a qualified occupational therapist which "includes improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation" and "improving ability to perform tasks for independent functions if functions are impaired" and "preventing, through early intervention, initial or further impairment or loss of function." 34 C.F.R. § 300.34(c)(6)(i)&(ii)(A-C).
- 71. The Respondent contends that the provision of direct occupational therapy services is contingent upon commensurable cognitive ability. However, the Respondent's witnesses failed to show any justification for this position. The *North Carolina Policies Governing Services for Children with Disabilities* do not support the Respondent's position. Instead, the definition of Motor Evaluation does not list cognitive testing as an area to be assessed for motor evaluations by physical therapist or occupational therapists. NC Policy 1500-2.11(b)(9). Similarly, the IDEA and its regulations do not limit provision of occupation therapy in this manner. 20 IDEA 1401(26); 34 C.F.R. § 300.34(c)(6).

Extended School Year ("ESY") Services

- 72. Under the IDEA, "[e]xtended school year services must be provided only if a child's IEP Team determines, on an individual basis . . . that the services are necessary for the provision of FAPE to the child." 300 C.F.R. § 300.106(a)(2).
- 73. The Fourth Circuit has found that "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *MM ex rel. DM*, 303 F.3d at 537–38. Where a child is transitioning from Part C to Part B, and turns three (3) during the summer, the school district must provide ESY "if needed by a particular child to receive FAPE." *Letter to Anonymous*, 22 IDELR 980 (OSEP 1995).
- 74. The IDEA requires that "[e]ach public agency must ensure that extended school year services are available as necessary to provide FAPE." 34 C.F.R. § 300.106(a).
- 75. Extended school year services are "special education and related services that (1) are provided to a child with a disability (i) beyond the normal school year of the public agency; (ii) in accordance with the child's IEP; and (iii) at no cost to the parents of the child; and (2) meet the standards of the SEA." 34 CFR § 300.106(b)
- 76. The standards of the SEA in North Carolina are provided in the North Carolina Policies Regarding Services for Children with Disabilities, Section NC 1501-2.4(b)(2), which states that a student qualifies for ESY based on:

Whether the student regresses or may regress during extended breaks from instruction and cannot relearn the lost skills within a reasonable time; or

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Whether the benefits a student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during extended breaks from instruction; or

Whether the student is demonstrating emerging critical skill acquisition ("window of opportunity") that will be lost without the provision of an educational program during extended breaks from instruction.

77. It is incumbent upon the party with the burden of proof to show, through evidence or testimony, that a student requires ESY as defined by the relevant standards of the SEA noted above.

Professional Judgment and Deference to Educators

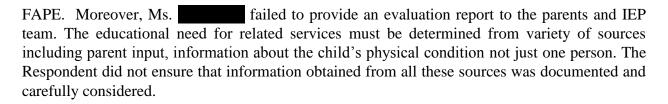
- 78. The professional judgment of teachers and other school staff is an important factor in evaluating an IEP. "Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartmann*, 118 F.3d at 1001. *See also Rowley*, 458 U.S. at 207 (stating that "courts must be careful to avoid imposing their view of preferable educational methods upon the States"). The "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents." *Lawson*, 354 F.3d at 328.
- 79. In addition, "a reviewing court should be reluctant indeed to second-guess the judgment of education professionals . . . we must defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 2017 (4th Cir. 1990) (citations and quotation marks omitted).

LEGAL CONCLUSIONS ON ISSUES FOR HEARING

ISSUE 1: Whether Petitioners met their burden of demonstrating that Respondent failed to offer a FAPE by determining that he did not require School Nurse Services ("School Nurse Services Issue) as a related service in the IEP meetings held on April 29, 2015 and February 2, 2016.

School Nurse Services Issue

- 80. In this case, the IEP team failed to conduct a medical service to determine TY's medical needs. Instead the IEP team deferred to a contract nurse with Wake County Human Services to evaluate TY's medical needs. Ms. Dougharm is not a licensed physician and had no authority evaluating what related services TY. needed for his medically related disability under the IDEA.
- 81. A licensed physician must determine a child's medically related disabilities that results in the child's needs for special education and related services. WCPSS did not use a licensed physician to determine 's need for School Nurse Services. Instead, WCPSS relied exclusively on Ms. 's determination that School Nurse Services were unnecessary. Ms. was not qualified to determine what medical related services were necessary for to receive a



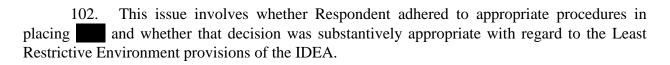
- 82. The testimonies of his treating medical providers were overwhelming that TY. needed School Nurse Services.
- 83. After the IEP Team unilaterally predetermined that School Nurse Services were unnecessary related services for [157], these same medical providers sent letters stating that needed skilled nurse services.
- 84. Respondent did not offer any rebuttal physician testimony that School Nurse Services as a related service was not necessary for TTY.
- 85. Moreover, the IEP team in this case chose School Nurse Services, not School Health Services. School Health Services was never mentioned at any of the IEP team meetings or documented in any of the IEP documents.
- 86. Since the IEP team chose School Nurse Services as the appropriate related service for Tay, delegation of medical tasks is not relevant. The medical tasks <u>must</u> be provided by a school nurse.
- 87. The Respondent committed many procedural and substantive violations with respect to the School Nurse Services issue.
- 88. Based on Findings 16-220 and other evidence in the record, Substantively, the Respondent failed to provide medical services as a related service, failed to include School Nurse Service as a related service on the April 29. 2015 and February 2, 2016 IEPs' service delivery plans. Respondent failed to properly evaluate 's medical needs. School Nurse Services as a related service was not properly considered ay the April 29, 2015 or February 2, 2016 IEP meetings.
- 89. Based on Findings 16-220 and other evidence in the record, the Respondent committed many procedural violations are that it failed to adequacy provide the Petitioners notice of its decisions in the Prior Written Notices about School Nurse Services; failed to explain the difference between School Nurse and School Health Services; predetermined that would not receive School Nurse Services; predetermined that the medical tasks would be delegated, and deprived the Petitioners of meaningful participation in the IEP process.
- 90. The IEP team failed to comply with the agreement at the July 17, 2015 IEP meeting with respect to the Six Month Trial, e.g. to collect and review additional physician input, parent input, medical documentation, and home health nurse input. The WCHS nurse charged with this responsibility testified that she had no intention of reviewing any additional information. Respondent's position was that School Health Services was the appropriate related service, however, the IEP team did not include School Health Services on the IEPs despite Respondent's position that

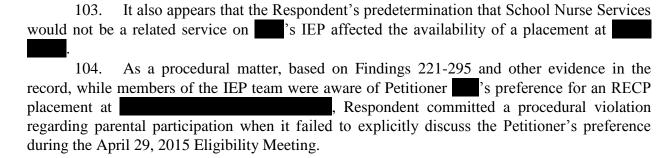
provided by school staff trained for that purpose. In addition, the Prior Written Notice did not note the refusal to provide School Nurse Services as a related service. These errors constitute procedural violations.

- 91. Based on Findings 16-220 and other evidence in the record, any procedural violations occurring at the April 29, 2015 meeting with respect to second regarding school nursing services at the April 29, 2015 meeting was never implemented. Petitioners asked for the issue to be reconsidered and provided a letter from services as pediatrician in support of School Nurse Services for the nurse communicated with the physician. The IEP team reconvened and proposed a six-month trial period with school nursing services to better understand services in a school setting, a proposal with which Petitioner agreed. These events cured the deletion of School Nurse Services as a related service and rendered harmless that particular substantive violation as to the Undersigned will not punish Respondent for revisiting and changing its decision based on new information, especially when the change occurred before even began attending school.
- 92. However, the procedural violations regarding School Nurse Services from the Eligibility Meeting and predetermination that School Nurse Services were not necessary without meaningful parent input and proper medical evaluation began at the April 14, 2015 referral and continued to the February 2, 2016 IEP meeting which constitutes a practice or pattern of the Petitioners meaningful participation in the IEP process, which rises to the level of a substantive violation.
- 93. The February 2, 2016 IEP decision to refuse continuation of School Nurse Services as a related service violated service violated 's right to a FAPE.
- 94. Based on Findings 16-220 and other evidence in the record, the IEP team's decision on February 2, 2016 to remove School Nursing Services from the IEP was not justified by the evidence before the team and not appropriate to meet services at school.
- 95. Although the IEP team is supposed to maintain final decision-making authority over the provision of related services such as School Nursing Services and School Health Services, the IEP team abdicated this authority to the WCHS nurse.
- 96. Based on Findings 16-220 and other evidence in the record, the IEP team did predetermine the nursing decision. The fact that staff members met to discuss the issue before formal IEP meetings is evidence of predetermination, and the record shows that the IEP meeting itself involved no discussions of nursing with the parent or opportunity for the parent to provide input. Instead, the parent was simply told that School Nurse Services would not be a related service.
- 97. In light of "s unique medical needs, the Undersigned is extremely concerned in this case that Respondent's staff did not collaborate with "s medical providers immediately before the meetings to remove School Nursing Services from the IEP. The Respondent's reliance on a WCHS nurse who had no training in the IEP process and failed to provide the IEP team any written report is also worrisome.

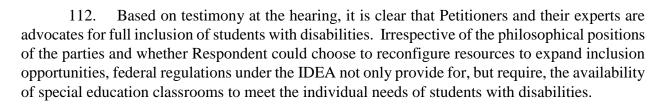
- 98. The IEP team did not have frank and detailed discussions with the parents about 's medical needs, did not independently evaluation his medical needs, and failed to explain to Petitioners the difference between School Nurse Services and School Health Services.
- 99. Contrary to Respondent's assertions, School Health Services were never discussed by the IEP team or documented in any of the IEP documents. If in fact the IEP team did choose School Health Services, it is not included on either the April 29, 2015 IEP or the February 2, 2016 IEP. This is, again, a procedural violation. Although Petition made no claims regarding the lack of School Health Services on either IEP, the Respondent has raised this as an issue when it used the Nurse Practice Act as a defense. The implication of Nurse Practice Act and Decision Tree were not explained to the Petitioners or discussed at any of the IEP meetings. To the extent the School Health Services should have been discussed in the alternative, the Respondent's denial the Petitioner meaningful participation in the decision making process of choosing School Health Services.
- 100. Based on the foregoing and the Conclusions of Law, the Undersigned concludes that Respondent did deny a FAPE with respect to the decisions regarding School Nursing Services and denied Petitioner meaningful participation in the decision making process.
- 101. Prior to filing due process and at the Resolution Meeting, the Respondent had opportunities to reconvene the IEP team and add School Nurse Services as a related service, but did not. In opening statement, the WCPSS' attorney stated that this is a case primarily about nurse services. The Undersigned agrees that, although other issues were raised in the Petition, this was a case about the provision of School Nurse Services. Had the Respondent again reconsidered its decision on School Nurse Services at the February 2, 2016 IEP meeting or the Resolution Meeting, this contested case hearing could have been avoided.
- ISSUE 2: Whether Petitioners met their burden of demonstrating that Respondent denied a FAPE by placing him in a Developmental Delay program in a separate preschool setting ("Placement Issue") for the 2015-16 school year.

Placement Issue





- 105. Like most parents of preschoolers transitioning from Part C of IDEA to Part B, this was the Petitioners first experience with IEP development and placement issues. LEAs are supposed to ensure a seamless transition between these Parts. 34 C.F.R. §§ 303.209(a)(1)(3)(ii) & 303.211(b)(6)(ii).
- 106. Instead, the Respondent failed to explain the continuum of preschool placement options available and the differences between the RECP and separate placements. Within that context, Respondent failed to further explain the three classroom options within the Separate setting placement.
- 107. Based on Findings 221-295 and other evidence in the record, the Undersigned concludes that this procedural violation did significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to in the least restrictive environment. The Respondent also failed to note on all the IEPs the placement options which had been discussed and ultimately chosen. It is also disturbing that WCPSS Senior Administrative Staff stated that the goals do not drive preschool placement and that it can be changed after the fact without revising the goals.
- 108. Although the procedural violation did deny the parent's meaningful participation, the procedural violation would still be harmless to the child if the educational placement selected by the team was, substantively, selected selected environment. See MM ex rel. DM v. Sch. Dist. of Greenville Cty., 303 F.3d 523, 534 (4th Cir. 2002) ("If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations.").
- 109. Based on Findings 221-295, and other evidence in the record, had specific needs with respect to accessing his education that included measures to guarantee his physical safety, measures to provide appropriate medical care, measures to remove distractions related both to materials and other students, and intensive individual instruction to address a lack of the most foundational skills needed to access a public education. needed a smaller setting with additional adult support and materials and activities modified to his level and significantly different than those accessed by his typically developing peers. More restrictive settings are appropriate where the "nature or severity of the disability" prevents satisfactory education in regular education settings with appropriate supports. *See* 20 U.S.C. § 1412(a)(5). Here, the evidence indicates that, without the related service (School Nurse Services), seeds met this standard, and these concerns were appropriate considerations for the IEP team.
- 110. However, the IEP team ability to adequately consider the continuum of placement options available for was thwarted by WCPSS' predetermination that School Nurse Services were not needed.
- 111. Based on Findings 221-295 and other evidence in the record, WCPSS denial of School Nurse Services contaminated any placement considerations to the point the IEP team could not fully consider whether so needs could be met in a RECP Developmental Day center like. Furthermore, the WCPSS' willingness to place at another Developmental Day center supports Petitioner assertion that there was a lesser restrictive environment available for



- 113. The Undersigned notes that although the Respondent has embedded the separate classrooms in regular elementary schools, had no meaningful interaction with nondisabled students at lunch, playground, or at specials (because of scheduling according to Principal).
- 114. Based on the foregoing, the Undersigned concludes that the full day program in the separate setting may have been the least restrictive environment appropriate for during this initial transitional phase primarily for safety reasons, however, the IEP team's conclusion that a full day separate setting was the least restrictive environment was tainted based on its predetermination of that placement and the denial of School Nurse Services which might have supported a lesser restrictive environment.
- 115. Therefore, the Undersigned concludes that the separate setting was not the least restrictive environment appropriate for , the procedural violation regarding consideration of the RECP setting at the Eligibility Meeting did impede 's right to a free appropriate public education, and procedural violation also impeded Petitioner 's right to meaningful participation in the placement decision process.
- ISSUE 3: Whether Petitioners met their burden of demonstrating that Respondent denied a FAPE between April 16, 2015 and April 15, 2016 by offering a substantively and procedurally inappropriate Individualized Education Plans with respect to: the provision of direct instead of support occupational therapy as a related services ("OT Issue"); failure to conduct necessary evaluations such as an FBA and an assistive technology/augmentative communication evaluation ("Evaluation Issue"); the remaining IEP goals ("Goals Issue"), the sufficiency of the progress monitoring ("Progress Monitoring Issue"); and the denial of Extended School Year services ("ESY Issue").
- 116. This issue involves a number of claims regarding specific portions of the IEP, including the adequacy of the evaluations conducted ("Evaluation Issue"), the adequacy of the present levels and the remaining IEP goals ("Goals Issue"), the adequacy of the supplementary aids and services, the provision of occupational therapy ("OT Issue"), and progress monitoring ("Progress Monitoring Issue"). Specific issues regarding School Nurse Services and Placement, which would otherwise also fall within this issue, have been addressed separately in Issues 1 and 2.
- 117. Based on Findings 296-345 and other evidence in the record, the evaluations conducted by the WCPSS were not sufficiently comprehensive to identify all of education needs. The WCPSS failed to use a variety of assessment tool and strategies to gather relevant functional, and academic information about 's education needs with respect to assistive technology evaluation. The Undersigned concludes that the IEP team denied a FAPE

by not conducting an assistive technology to determine his augmentative communication needs during the 2015-16 school year and integrating those devices with his communication goals.

- 118. Based on Findings 346-350 and other evidence, the Undersigned concludes that the Petitioners failed to meet their burden and prove by a preponderance of the evidence that a FBA was necessary for to receive a FAPE.
- Respondent did not conduct its own OT evaluation but instead adopted the Early Intervention OT Evaluation except for the service delivery recommendations. Because the Respondent relied on the Early Intervention OT Evaluation, it should have included direct OT services as a related service in service in service. In her evaluation, Ms. recommended 1 time a week sixty-minute session, however, when she testified she recommended 1 time a week for 30-45 minutes' session. failed to make progress on his fine motor skills during the period from August 2015 to April 15, 2016. Respondent denied a FAPE by not providing direct OT services and owes compensatory OT for the school weeks from August 3, 2015 to April 15, 2016.
- 120. Based on Findings 296-302, 313-345 and other evidence in the record, the Undersigned concludes that the Petitioners failed to meet their burden and prove by a preponderance of the evidence that the Present Levels of Academic Achievement and Functional Performance were inadequate to describe so level of functioning. Minor discrepancies regarding so skills at that time supported the descriptions written into the IEP prior to his enrollment.
- 121. Based on Findings 313-345 and other evidence in the record, the remaining IEP goals, except for the integration of an augmentative communication device in his communication goals, were appropriate given 's individual needs. 's needs were broad and deep, and the IEP goals focused on the specific skills he would need in multiple critical areas in order to successfully access his education both in preschool and upon entry into Kindergarten. Other than the integration of augmentative communication devise in the communication goals, the goals were specific, task-oriented, and measurable.
- Based on the Findings of Fact and other evidence in the record, with the exception of the School Nurse Services issue, the lack of specific supplementary aids and services listed in the IEP did not deprive of educational benefit. Many of the supplementary aids and services that would need to access his education were incorporated into the structure and practice of the Developmental Delay classroom at School and thus were not needed as part of the IEP of any student in that classroom. In addition, testimony supported that many other supports that would ordinarily be listed in the IEP were provided to as needed to support his educational progress. See J.P. v. Enid Pub. Sch., No. CIV-08-0937-HE, 2009 WL 3104014, at *8 (W.D. Okla. Sept. 23, 2009) (finding IEPs appropriate despite lack of certain services because "[m]any of the services that plaintiffs point to as lacking from the IEP document were actually provided by the District"). At most, this is a harmless procedural violation.
- 123. A plan reasonably calculated to provide some educational benefit, evidence of progress supports a conclusion that the IEP is appropriate. *See M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002) (stating that "courts should endeavor to rely on objective factors, such as actual educational progress, in order to avoid substituting our own

notions of sound educational policy for those of the school authorities which we review") (internal quotation marks omitted).

- 124. Based on Findings 381-400 and other evidence in the record, made incremental but meaningful progress on many of his IEP goals, except for fine motor skills and his communication skills with respect to the use of assistive technology. This progress supports the overall appropriateness of the IEP, except in areas of fine motor and augmentative communication.
- 125. Based on the Findings of Fact and other evidence in the record, other than the Conclusions discussed above, the IEPs in place for during the relevant period were reasonably calculated to provide with an opportunity to meaningful educational progress. 's IEPs clearly provided "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (quoting *Rowley*, 458 U.S. at 203). The related services were also sufficient except for the use of related service support description instead of direct services for occupational therapy.
- 126. Based on the Findings of Fact and other evidence in the record, Respondent implemented the IEP with fidelity. Witnesses from the school staff credibly testified regarding their efforts to work with on his IEP goals, provide necessary accommodations and supports, and meet his individualized needs. Any failures in implementation, including provision of related services and lack of nursing coverage causing a few absences, were *de minimis* and did not impact the provision of FAPE to However, it is the Respondent's ultimate responsibility to provide a substitute nurse when his usual nurse is absent and arrangements must be made to ensure nursing coverage.
- 127. Based on Findings 381-400 and other evidence in the record, while Respondent's progress monitoring could certainly have been better, it was sufficient to allow for appropriate educational planning for and did not result in a denial of FAPE. Respondent indicated that it plans to provide additional training for its staff as to evidence based progress monitoring procedures.
- Respondent failed to discuss ESY services during the April 29, 2015 IEP meeting and this is a procedural violation, Petitioners presented no evidence to show that actually required ESY services under the criteria set forth in the North Carolina regulations. Specifically, Petitioners presented no evidence of regression during breaks from instruction, no evidence that could not relearn the lost skills within a reasonable time, and no evidence that emerging critical skills would be lost without the provision of ESY services. The Undersigned therefore concludes that Petitioners have failed to meet their burden with regard to their ESY claims. See Dibuo v. Worcester Co, 309 F.3d 184, 187-189 (4th Cir 2002) (where Petitioners' expert opinions and testimony at hearing did not establish that the student was eligible for ESY, the IEP team's failure to appropriately consider ESY did not interfere with the provision of FAPE).
- 129. As the appropriateness of the IEP and related services, the Undersigned concludes that Respondent had failed to provide a FAPE by: 1. not conducting an assistive technology evaluation and integrated assistive technology with his communication goals, and 2. not including direct occupational therapy services. Petitioners have not met their burden of demonstrating that

the IEPs offered by Respondent, or the implementation thereof, were inappropriate as any of the other goals, ESY Issue, Progress Monitoring Issue, and the Evaluation Issue with respect to a FBA.

Cumulative Procedural Violations

- 130. Respondent admits it committed numerous procedural violations in this case.
- 131. Respondent failed: to complete the continuum of placement sections of all the IEPs; failed to provide sufficient Prior Written Notices about placement decisions, the School Nurse Services decisions, and direct Occupational Therapy decision; failed to include School Nurse Services on the service delivery plan on the July 17, 2015 IEP; To the extent applicable, failed to include School Health Services on the April 29, 2016 and February 2, 2016 IEPs as a related service and in the service delivery sections; failed to properly consider and document ESY discussions, held Pre-IEP meetings, and predetermined IEP services. All of these procedural violations cumulatively significantly impeded the Petitioners meaningful participation in the IEP process.
- 132. The cumulative effect of these numerous procedures violated s's right to a FAPE and his parents' meaningful participation in the IEP decision making process such that relief should be granted.

Other Issues

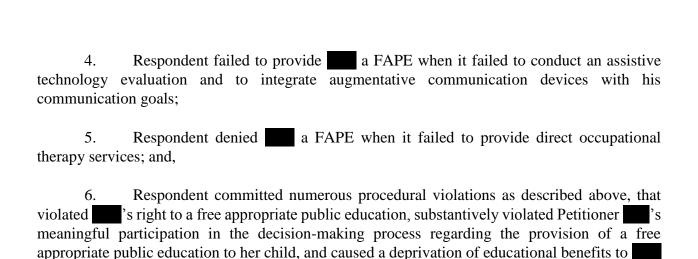
133. To the extent that this Order does not expressly rule on any other claims raised in the Petition, the Undersigned concludes that Petitioners did not meet their evidentiary burden to establish any right to relief under those claims.

THEREFORE, the Undersigned finds and holds that there is sufficient evidence in the records to properly and lawfully support the Conclusions of Law cited above.

FINAL DECISION

BASED upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

- 1. Respondent failed to provide a FAPE when it denied School Nurse Services in the February 2, 2016 IEP in both the classroom and during transportation to/from school;
- 2. Respondent denied the Petitioners meaningful participation when it predetermined that School Nurse Services would not be a related service for from April 29, 2015 to February 2, 2016, but was not harmed from July 17, 2015 to February 2, 2016 because the Respondent reversed its July 17, 2015 decision; therefore, relief is not awarded for that period;
- 3. Respondent committed numerous procedural violations as well as predetermined placement with respect to the placement decision in the separate preschool classroom which substantively denied the Petitioners meaningful participation in the placement decision and denied a FAPE;



7. Petitioners have failed to meet their burden to prove that Respondent denied a FAPE with respect to: failing to conduct an FBA, Progress Monitoring, ESY and appropriateness of the other goals in the April 29, 2015, July 17, 2015 and February 2, 2016 IEP's.

IT IS HEREBY ORDERED THAT:

- 1. The Respondent shall provide School Nurse Services as a related service and include it on the IEP Service Delivery and provide School Nurse Services during transportation and at all school related activities;
- 2. The Respondent shall convene an IEP meeting to afford the Petitioner meaningful participation in the determination of the Least Restrictive Environment for placement in light of the inclusion of School Nurse Services as a related service:
- 3. The Respondent shall conduct an assistive technology evaluation to determine what augmentative communication devices are needed and integrate those communication devices in 's IEP and convene an IEP meeting to modify 's communication goals accordingly;
- 4. The Respondent shall provide twenty-five (25) sessions of compensatory direct 1:1 occupational therapy services in the amount of one time a week, forty-minute duration for each session to compensate for direct OT not delivered during the period of August 3, 2015 to April 15, 2016.
- 5. Because of the numerous procedural violations, Respondent shall provide training to its preschool staff on IEP development, Placement considerations, Prior Written Notices, ESY determinations, and Progress Monitoring.
- 6. The Petitioners are prevailing party on the issues of School Nurse Services, Placement, Assistive Technology Evaluation, and Occupational Therapy.

IT IS FURTHER ORDERED THAT:

- 7. The Petitioner has failed to carry its burden of proof on the all other remaining claims and those are **DISMISSED WITH PREJUDICE.**
 - 8. The Respondent is prevailing party on those claims.

IT IS SO ORDERED.

NOTICE OF APPEAL RIGHTS

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 et seq.) and particularly N.C.G.S. §§ 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

This the 13th day of March, 2017.

B

Stacey Bice Bawtinhimer Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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Affiliated Agency

This the 13th day of March, 2017.

<u>LG</u>

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